TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914 1915

No. [redacted] 411 112

THE UNITED STATES, APPELLANT,

vs.

GEORGE F. ARCHER AND KATE C. ARCHER.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 23, 1914.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 975.

THE UNITED STATES, APPELLANT,

vs.

GEORGE F. ARCHER AND KATE C. ARCHER.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition and Exhibit "A." Filed July 19, 1909.*

In the Court of Claims.

GEORGE F. ARCHER ET AL.
vs. No. 30471.
THE UNITED STATES.

PETITION.

To the honorable, the Court of Claims:

The petition of George F. Archer and Kate C. Archer, his wife, both residents of the county of Washington, State of Mississippi, would respectfully state and show unto the court;

[1]

That they are the owners in fee of those lands lying and being situated in Chicot County, Arkansas, and described as "Point
2 Chicot Plantation," being that tract of land opposite the town of Greenville, Mississippi, bounded on the north, east, and west by the waters of the Mississippi River, and on the south by "Leland Plantation," and more particularly described as follows, to wit:

All of fractional sections 4, 5, 6, 7 and 9; all of section 8, and part of fractional sections 17, 18, 19, and 20, lying north and east of a certain line of fence which formerly divided said Point Chicot Plantation from the improvements of J. B. Miles, all being in township 15 south, range 1 east, in Chicot County, Arkansas, with all accretions, alluvions, and additions thereunto, and all privileges and appurtenances thereunto belonging, and comprising 6,000 acres more or less.

[2]

That the title of your petitioners to said land is deraigned as follows, and the original instruments will be introduced at the hearing hereof if desired.

United States to the State of Arkansas, by and through an act of Congress, known as the swamp land act of 1850, and patent thereunder, conveying said lands and same being patented by the United States to the State of Arkansas, the same being described as fractional sections 4, 5, 6, and 7 and 9, and all of sections 8, 17, 18, 19, and 20, township 15, range 1 east.

United States to Samuel Parker, patent to said fractional section 16, as shown by certificates from United States General Land Office at Washington, D. C.

Samuel Parker to Horace F. Walworth, deed recorded in the records of Chicot County, Arkansas, in Book J, page 62.

3 State of Arkansas to Horace F. Walworth, patent to fractional sections 4, 5, 6, 7, and 9, and all of sections 8, 17, 18, 19, and 20, township 15, range 1 east, as shown by certificate from State land office of the State of Arkansas.

Horace F. Walworth to Aaron Goza and Francis Griffin, deed dated January 1, 1856, retaining vendor's lien for purchase money, recorded in records of Chicot County, Arkansas, in Book H, page 139.

Aaron Goza to Francis Griffin, deed dated December 17, 1858, and recorded in the records of Chicot County, Arkansas, in Book 1, page 506.

Francis Griffin and Aaron Goza to Horace F. Walworth; mortgage to secure amount due on purchase price, recorded in the records of Chicot County, Arkansas, in Book H, page 155.

Suit in chancery court of Chicot County, Arkansas numbered ——, styled John S. Whittaker, as executor of Horace F. Walworth, deceased, vs. T. H. B. Lawrence, as assignee in bankruptcy of Aaron Goza and Edmund P. Johnson, as administrator of the estate of Francis Griffin, deceased, and the said Edmund P. Johnson and Isabella, his wife, in her own right, and John Griffin, as heirs at law of Francis Griffin, deceased, and Benjamin W. Foley, which suit foreclosed the vendor's lien and mortgage above named.

The final decree in this case is found in the records of said chancery court, in Chancery Record C, page 441, and was rendered April 21, 1869.

The decree approving sale and deed thereunder to John S.
4 Whittaker as below stated, was approved on October 20, 1869, as shown in said Chancery Record Book G, page 457.

The original papers in this suit are all lost and cannot be found by diligent search.

D. H. Reynolds and C. H. Carlton, commissioners of said Chicot County chancery court in above suit, to John S. Whittaker, as trustee and agent of the heirs at law of Horace F. Walworth, deceased, deed dated October 18, 1869, and recorded in the records of said county, in Record Book M, page 487.

Will of John P. Walworth, a son of the above-named Horace F. Walworth, giving his wife, Sarah, all his property, said will being probated in Chicot County, Arkansas, May 3rd, 1883, and recorded in Will Book D, page 19.

John S. Whittaker and his wife, Mary, to Sarah Walworth, Mary H. Lawrence, Hannah Strickland, each one-fourth; Mary W. Beadbury, John Walworth, Anna Walworth, and Sarah Walworth, each one-sixteenth. Quit-claim deed, dated November 19, 1897, and recorded in the records of Chicot County, Arkansas, in Deed Book H-1, page 44.

Sarah Walworth to John P. Walworth, warranty deed, dated October 12, 1890, conveying one-fourth interest, recorded in Deed Record Book of Chicot County, Arkansas, M-1, page 154.

John Walworth and wife, Mary E. Walworth, Mary H. Severance, a widow, Miss Ann Walworth, William A. McPheeters, and Ernest Walworth, quit-claim deed, dated March 1, 1897,
5 and recorded in the records of said county in Record Book Q-1, page 548.

Sarah Walworth, widow; Douglas Walworth and wife, Jeannette; Miss Clara Walworth; Mary H. Severance, widow; Miss Anne Walworth; John Walworth and wife, Mary R. Walworth; Ernest Walworth and wife, Mary Y. Walworth; John P. Walworth and wife, Alice Gordon Walworth; and William A. McPheeters to George F. Archer and James A. Deaton, warranty deed, dated August 2, 1896, and recorded in the records of Chicot County, Arkansas, in Deed Record Book Q–1, page 556.

The grantors in last-named deed were all the heirs and claimants of every kind and description by, through, or under the above-named Horace F. Walworth.

The description in this latter deed is above set forth in paragraph one.

Will of James A. Deaton, who died, gives to Kate C. Deaton, now Kate C. Archer, one of the defendants herein, all his real estate and personal property, and was probated in Chicot County, Arkansas, February 27, 1899, and appears in probate record of said county in Book F, page 172, and is also recorded in will book of said county records D, page 103.

Petitioners and those under whom they claim have been in actual, open, notorious, and continuous adverse possession of all of said
6 lands ever since they were entered from the Government; that is, ever since the year 1859, claiming the title in themselves against the world.

[3]

The said Point Chicot Plantation, prior to the inception of the levee system on the Mississippi River, and for many years subsequent thereunto, and until the final completion of said levee system, as hereinafter mentioned and set forth, was of great value and was in a high state of cultivation, the lands of which it is formed being highland, and from their natural situation were free from overflows of the Mississippi River except at long intervals, the recurrence of such overflows being so separated in point of time as not to easily affect either the value of the productive capacity of said lands; that said plantation was highly improved and stocked with labor and tenants and yielded large crops and was worth not less than $1,000,000.00.

[4]

From time immemorial the waters of the Mississippi River, during the highest stages thereof, when not contained within the banks of said river, naturally found outlets below the highlands, near Helena, Arkansas, into the White River and upper Tensas Basin and into the St. Francis Basin, and through the rivers draining these basins eventually into the Gulf of Mexico. The outlets and drains thus provided by nature were such as to accommodate said flood waters, and as the result of such accommodation and basining of the waters, the lands hereinabove described were, as stated, virtually uninjured by overflows.

J5

That beginning about the year 1883 and continuing to the present, the officers and agents of the United States, in pursuance of an act of Congress creating the Mississippi River Commission, and other acts amendatory thereto, and for the improvement of the Mississippi River, adopted a plan, the so-called Eads Plan, and in consequence thereof have projected and constructed and maintained and are now engaged in constructing and maintaining a system of public works whereby the flood waters of the Mississippi River are retained within and between lines of levees along both sides of said stream, whereby said flood waters being confined within said channel of the river and lines of levees, and compassed within a narrower scope than heretofore, acquired an increased velocity and higher elevation, and the current thereof became more strong and forceful.

The plan of these officers and agents of the United States so acting, was to increase said velocity and scouring power of the water, and to scour and deepen the channel of the Mississippi River, and thereby improve navigation. By so doing, the waters being confined within a narrower compass, as above indicated, have, by the laws of nature, attained a higher elevation, said elevation being not less than six feet at high-water stage.

Coupled with and supplementary to this said construction
8 work there have been adopted and used in connection therewith various systems of private and local municipal levees erected for the purpose of reclaiming overflowed lands on both sides of the river by keeping the flood waters off of said lands, and these levees, being constructed on both sides of the Mississippi River, have so confined the flood waters of that stream, with the result above stated.

[5]

That in consequence of the closing of the natural basins and outlets, as aforesaid, the channel of said river has been scoured, and many waste lands and overflowed lands on both sides of the river have been incidentally reclaimed, and that vast benefit has accrued to the States of Mississippi, Arkansas, and Louisiana by reason of said construction, and to the landowners of said States behind said levees; but that the lands of your petitioners, situated between said levees, and on the outside thereof, and not protected thereby, have been subjected to repeated overflows, tending to diminish and impair their value. That your petitioners from their private means have been unable to levee their said lands by private levees, and to so protect them from the increased elevation of the river.

That a part of the levee system so constructed and maintained runs back of said Point Chicot Plantation, not touching the same, and that between it and said Point Chicot Plantation is a stretch of ground lower than the main body of said plantation, and in periods of high water, the water rising, passing over and upon said land,
has, by reason of its lowness, first gone thereupon, and its
9 main current was across said land, and not upon Point Chicot Plantation, which, while in extreme high water, would be

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flooded as hereinabove set forth, did not have the full force of the current of the Mississippi River thereupon, but was covered in part or in whole by slacker water.

That the current during high-water seasons, being as aforesaid, struck against and impinged upon the said levee back of said Point Chicot Plantation, and protecting the lands on the interior, and that such impingement resulted in the waters of said river eroding and washing away said levee, to the great danger of its existence, and threatening to break through said levee and inundate said lands to the rear thereof, and divert the water from the channel of the river. Such breach or crevasse in said levee would have entailed great damage thereunto, and to the adjacent landowners, and impaired the efficacy of said levee system, as projected, constructed, and maintained by the officers of said Mississippi River Commission, in accordance with the plans heretofore stated.

In addition to the danger which threatened the levee, said current impinging upon the banks of the stream, and the neck of land adjoining Point Chicot to the main land, cutting into it, threatened to and would have, if permitted to continue, cut through said neck of land, thus straightening the channel and making Point Chicot Plantation an island, and thereby freer from overflows.

[6]

In order to prevent the threatened danger, both to the levees and to the integrity of the connecting neck of land, the officers and agents of the United States Government, acting under authority of the acts of Congress, and the Mississippi River Commission constructed what is known as the Leland Dyke, running diagonally and at an angle from the main line of levee on the Arkansas side, across and on said reclaimed land, nearly to a point where the line Point Chicot Plantation begins; their object being to divert the current of the stream during high waters, from impinging upon said levee, and by throwing it eastward by said dyke to prevent the destruction of the levees and the cutting across the neck aforesaid.

The effect thereof was to throw the current of said stream on Point Chicot Plantation, and so violent was its force during the next high water in 1904 that it not only tore up and destroyed a part of said plantation, but caved away the end of said dyke, and came near to destroying the same, whereupon, during the year 1904, the officers and agents of the United States Government, as aforesaid, extended said dyke, and built the same in and upon the lands of your petitioners, without any condemnation of said lands, and with no remuneration therefor being made to your petitioners, and used a large part of the actual soil of your petitioners' plantation for constructing said dyke, all without remuneration, and against the remonstrances of your petitioners, who, however, feel themselves to be and were powerless to contend with the Government of the United States.

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The result of said extension was to still further divert to the eastward the current of said stream, and all that part of
11 Chicot Plantation lying near or adjacent to said dyke so extended upon the lands of your petitioners, and called by the officers and agents of said Government, in their reports Leland Dyke was washed away, scoured out and destroyed, the top soil thereof being removed to a depth of several inches, and the land rendered unfit for cultivation, the tenant houses which were on said land being washed away and destroyed.

The diverting of said waters, freighted as they are during high-water seasons with immense burdens of sand and silt, caused them, upon reaching the high lands of your petitioners' plantation, to deposit thereon tremendous burdens and loads of gravel and sand, and the same have been superimposed and placed upon said lands with the effect of rendering them unfit for cultivation and destroying their value. That said extension first went over into and upon the land of your petitioners, as aforesaid, a distance of some six hundred feet, but the end of said extended dyke being exposed to the waters of the Mississippi River and to the powerful current as above mentioned, the said officers and agents of the United States Government deemed it necessary to again extend the same a distance of some two thousand feet further into and upon the land of your petitioners, and did so extend the same in the year 1904, without any condemnation of said land and with no remuneration therefor being made to your petitioners, said officers and agents using a large part of the soil of your petitioners' plantation for the construction of said extension.

12 Since building said second extension the effects hereinabove set forth have been increased, until at the present time, by reason of the washing and scouring of the top soil of said plantation and the deposit upon a great part of said plantation of superimposed burdens and loads of gravel and sand, which are gradually extending over the entire property, destroying its value and rendering it unfit for cultivation, thousands of acres have been rendered worthless, and the terrible currents of the Mississippi River being thrown directly upon your petitioners' land, have swept away and destroyed, as aforesaid, the houses and barns of your petitioners, drowned stock, and carried away implements, according to the bill of particulars herewith submitted.

[7]

That while your petitioners recognize the benefit to inland owners of the incidental protection by said levees, your petitioners have seen their Point Chicot Plantation ruined and its efficiency destroyed by the works hereinabove described, constructed and made by the officers of the United States Government; and your petitioners state that the precipitation and flooding and superimposition of the dirt, sand, and gravel upon their said plantation, and the washing away of live stock, fences, and homes, and rendering said plantation unfit for cultivation, and the destroying of its value, are such serious in-

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terruptions to the ordinary, necessary, and common use of property as to be equivalent to a taking, within the meaning of the constitutional provisions and being done in pursuance of the acts of
13 Congress authorizing the same, for the public benefit, under the direction of the officers of the United States, acting under said authority, imposes upon the Government an implied obligation to make compensation for the property so taken and destroyed.

That no action other than that aforesaid has been had on this claim; that the claimants are the sole owners thereof, and the only persons interested therein, and that they have made no assignment of this claim or of any interest therein to any person; that they are justly entitled to the amount claimed from the United States; that they are citizens of the United States and claim therefrom, in compensation for their lands and property so taken and destroyed, and ask judgment for the sum of $300,000.00 as per bill of particulars of the property taken attached hereto and prayed to be made a part thereof, and marked "Exhibit 1."

PERCY BELL, *Attorney for Claimants.*

STATE OF MISSISSIPPI,
County of Washington.

George F. Archer, for himself, and as agent and attorney in fact for the co-claimant, being by me duly sworn, deposes and says that they are the claimants in this case in the Court of Claims. That he has read the above petition, and that the matters therein stated are true to the best of his knowledge and belief.

(Signed) GEORGE F. ARCHER.

Subscribed and sworn to before me this 16th day of July, A. D. 1909.

J. H. ROBB, *Notary Public.*

14 EXHIBIT 1.

Bill of particulars.

Value of 3,696 acres, at $50.00 per acre, destroyed and taken by being occupied by dyke and barrow pits, washed away, and covered by sand and other deposits	$184,800.00
800 hogs drowned	2,000.00
20 cattle drowned	500.00
28 cabins destroyed	4,200.00
5 bales of cotton in house washed away	250.00
12 mules drowned	1,200.00
15 horses drowned	1,500.00
19 houses destroyed	6,700.00
Crop of 1903 destroyed	2,500.00
Total	$203,350.00

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15 II. *Demurrer. Filed August 11, 1909.*

In the Court of Claims of the United States.

GEORGE F. ARCHER ET AL.
vs.
THE UNITED STATES. } No. 30471.

DEMURRER.

And now comes the said defendant, by the Attorney General, and demurring to the petition in this cause, states as the ground therefor that the petition does not allege facts sufficient to constitute a cause of action.

And, further demurring to each and every item of said petition, states as ground therefor that the allegations of fact setting forth each of said items of the claim do not constitute a cause of action as to any one of the items therein contained.

JOHN Q. THOMPSON,
Assistant Attorney General.

WILLIAM W. SCOTT,
Assistant Attorney.

16 III. *Traverse. Filed April 4, 1911.*

In the Court of Claims of the United States, December Term, A. D. 1913.

GEO. F. ARCHER AND KATE C. ARCHER
vs.
THE UNITED STATES. } No. 30471.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

17 IV. *Argument and submission of case.*

On April 4, 1911, this case came on to be heard. Mr. Percy Bell was heard for the claimants; Mr. W. W. Scott was heard in opposition and the case was submitted.

18 V. *History of proceedings.*

On December 4, 1911, the court filed a findings of fact and conclusion of law and entered judgment for the claimant for $47,000, with an opinion by Barney, J.

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On December 20, 1911, claimants filed a motion to amend findings of fact.

On January 16, 1912, defendant filed a motion to amend findings of fact.

On January 24, 1912, the case was reargued and submitted.

On February 12, 1912, the court withdrew its former findings and conclusion of law and opinion and filed new findings of fact and conclusion of law and entered judgment for claimants in the sum of $83,920.

On May 18, 1912, defendant filed a motion for new trial, which was argued and submitted February 4, 1913.

19 VI. *Order of court overruling defendants' motion for new trial and reducing judgment. Filed October 27, 1913.*

ORDER.

This case coming on to be heard on the defendants' motion for a new trial, It is ordered that the judgment heretofore rendered be reduced by the sum of twenty-nine thousand dollars ($29,000), and judgment is accordingly rendered at this time in favor of the claimants for the sum of fifty-four thousand nine hundred and twenty dollars ($54,920).

The motion of the defendants for a new trial is overruled.

Booth, J., dissenting:

I think this case comes within the decision of the Supreme Court in the Jackson case, No. 18274, and Hughes case, No. 30606, recently decided. There is a liability for the lands actually taken and upon which the improvement rests. I think the judgment should be strictly limited thereto.

Campbell, Ch. J., not having heard the original case, took no part in the decision of this motion.

20 VII. *History of further proceedings.*

On November 6, 1913, defendants filed a motion for a new trial and to amend findings of fact.

On Nov. 10, 1913, defendants filed a motion to amend the findings of fact.

On November 17, 1913, claimants filed a motion to strike from the files defendants' motion for a new trial.

On November 19, 1913, defendants filed a motion to set aside judgment and for a new trial.

On January 12, 1914, defendants' motion of November 19, 1913, was overruled.

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VIII. *Order of court on defendants' motion amend findings of fact. Filed February 16, 1914.*

"Allowed in part and overruled in part. Findings amended nunc pro tunc as of February 12, 1912. Judgment and opinion to stand."

BY THE COURT.

Filed February 16, 1914.

21 IX. *Findings of fact, as amended, filed February 16, 1914, nunc pro tunc, as of February 12, 1912. Conclusion of law and opinion of the court.*

This case having been heard by the Court of Claims, the court upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimants herein, George F. Archer and Kate C. Archer, were in the year 1903, have been since, and are now, the owners in fee of those lands lying and being situated in Chicot County, Ark., and described as "Point Chicot plantation," being that tract of land opposite the town of Greenville, Miss., bounded on the north, east and west by the waters of the Mississippi River and on the south by "Leland plantation," and more particularly described as follows, to wit: All of fractional sections 4, 5, 6, 7, and 9; all of section 8, and parts of fractional sections 17, 18, 19, and 20, lying north and east of a certain line of fence which formerly divided said Point Chicot plantation from the improvements of J. B. Miles, all being in township 15 south, range 1 east, in Chicot County, Ark., with all accretions, alluvions, and additions thereunto, and all privileges and appurtenances thereunto belonging, and comprising 6,000 acres, more or less.

II.

Said Point Chicot plantation, prior to the construction of the levee system to the state of completion, which now exists, was of great value and was in a high state of cultivation, the lands of which it is formed being reclaimed lands and comparatively high and free from overflows of the Mississippi River, except at intervals, the recurrence of such overflows being so separated in point of time as not to materially affect either the value or the productive
22 capacity of said lands; and that said plantation was highly improved with houses and cabins thereon and stocked with laborers and tenants and yielded large crops.

At Greenville, Miss., opposite the claimants' land, has been kept a United States gauge continuously since 1882, and at Lake Providence 64 miles south of Greenville, for some years prior to 1882—that is

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from 1844. The gauge readings at these two places and the computed flood levels at Point Chicot for years of high water are as follows:

Elevation of floods, Chicot Point, Ark., mile 473 R. below Cairo, upper Tensas district.

[Computed from Lake Providence and Greenville gauges.]

Years.	Lake Providence.	Gauge at Greenville.	Computed elevation, Point Chicot.[1]	Years.	Lake Providence.	Gauge at Greenville.	Computed elevation, Point Chicot.[1]
1844	.....	42.16	139.4	1890	.....	43.45	140.5
1858	.....	43.00	140.1	1891	.....	43.25	140.4
1862	40.87	.....	140.5	1892	.....	44.28	141.4
1867	.....	39.92	137.0	1893	.....	44.30	141.4
1872	35.15	.....	[2] 133.3	1894	.....	35.40	[2] 132.5
1873	36.12	.....	135.4	1895	.....	27.75	[2] 124.9
1874	37.37	.....	136.7	1896	.....	34.60	[2] 131.7
1875	37.29	.....	136.6	1897	.....	46.75	[3] 144.0
1876	37.95	.....	137.3	1898	.....	46.16	[3] 143.4
1877	35.82	.....	135.0	1899	.....	43.00	140.1
1878	35.80	.....	135.0	1900	.....	33.75	[2] 130.8
1879	36.00	.....	135.2	1901	.....	37.40	[2] 134.4
1880	38.05	.....	137.4	1902	.....	36.05	[2] 133.2
1881	36.17	.....	135.4	1903	.....	49.10	[3] 145.7
1882	.....	41.68	138.8	1904	.....	43.55	140.6
1883	.....	40.40	137.5	1905	.....	36.80	[2] 133.9
1884	.....	41.10	138.2	1906	.....	44.90	142.0
1885	.....	38.05	135.2	1907	.....	47.30	144.4
1886	.....	41.20	138.3	1908	.....	44.75	141.8
1887	.....	40.80	137.9	1909	.....	44.80	141.9
1888	.....	40.55	137.7	1910	.....	37.00	[2] 134.1
1889	.....	31.85	[2] 129.0				

[1] Memphis datum.
[2] No overflow; overflow at 135 elevation, Memphis datum.
[3] From actual elevation.

The Point Chicot plantation has been overflowed whenever the water surface rises to 135 feet, Memphis datum, and said lands have been more or less overflowed every year except two, 1872 and 1889, during the 18 years prior to 1891, up to which time the levee system had not been completed sufficiently to withstand great floods and the outlets unclosed; and during the 20 years following 1891 after the levee system had been made effective and the outlets closed by the United States and the local authorities, there were 8 years, namely, 1894, 1895, 1896, 1900, 1901, 1902, 1905, and 1910, during which the claimants' land was not overflowed.

The claimants' Point Chicot plantation is overflowed at a stage of 38 feet on the Greenville gauge, or whenever the water surface rises to 135 feet, Memphis datum, and the gauge readings show that of the 15 years from 1882 to 1896, inclusive, there were only 4 years in which this stage was not exceeded, and that of the 14 years from 1897 to 1910, inclusive, there were 5 years in which this stage of 38 feet on the Greenville gauge was not exceeded.

23

III.

From time immemorial the waters of the Mississippi River during the highest stages thereof, when not contained within the low-water

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banks of said river, naturally found outlets below Cairo into the St. Francis Basin, and below the highlands near Helena, Ark., in the White River, Yazoo, Tensas, Atchafalaya, and Pontchartrain Basins, and through the rivers draining these basins eventually into the Gulf of Mexico. The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands hereinabove described were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river for navigation and by the State and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows.

IV.

Prior to 1883 the States and local authorities had constructed a system of levees for the protection and reclamation of lands subject to overflow from the mouth of Red River to the mouth of the Arkansas, and from the mouth of the Yazoo to the highlands below Memphis. The flood waters of 1882 destroyed miles of these levees, leaving a levee line containing 6,278,728 cubic yards in the lower Yazoo levee district, which is in the vicinity of Point Chicot, but on the opposite side of the river in the State of Mississippi and leaving a levee line in the upper Tensas district, which is south of Point Chicot on the same side of the river in the State of Louisiana, containing 1,788,304 cubic yards, and a levee line in the middle Tensas district, still farther south, containing 3,631,400 cubic yards.

Beginning about the year 1883 and continuing to the present time the officers and agents of the United States, in pursuance of an act of Congress creating the Mississippi River Commission and other acts amendatory thereto, and for the improvement of the Mississippi River for navigation, adopted a plan, the so-called Eads plan, and in consequence thereof have projected and constructed and maintained and are now engaged in constructing and maintaining certain lines of levees on both sides of the river at various places for various distances from Cairo, Ill., to near the Head of the Passes, a distance of 1,050 miles by river from Cairo, and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming land within their respective districts from overflow in times of high water.

The levee lines so constructed by the United States and the local authorities have been practically joined, with the result that the flood waters of the Mississippi River to a great extent are confined within and between said levee lines, and, encompassed within a narrower scope than heretofore, acquired an increased velocity and higher elevation and the current thereof has become stronger and more forceful.

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The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water
24 and to scour and deepen the channel of the Mississippi River and thereby improve it for navigation, and the purpose of the officers and agents of the State and local authorities constructing lines of levees at various places along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing the waters being confined within a narrower compass, as above indicated, have by laws of nature attained a higher elevation of approximately 6 feet in times of high water.

From time immemorial and as far back as the records show the flood stages of the Mississippi River, the high-water bed of that river, was between the highlands on the east side and highlands on the west side. The lands of the claimants in controversy in this suit are located within this boundary on Point Chicot, in Chicot County, Ark.—that is, between the highlands on the Mississippi side of the river and the highlands on the Arkansas side—and have been occasionally overflowed at times of high water, as stated in Finding II, before as well as since the construction of levees.

From Cairo, Ill., to the mouth of the Yazoo River just north of Vicksburg the Mississippi River is practically leveed on both sides, except on the east side where the highlands abut on or very near the river in Kentucky and Tennessee (from Port Jefferson, Ky., to a short distance south of Memphis, Tenn.), and thence on the west side to near the Head of the Passes, or to a point 1,050 miles by river from Cairo, and on the east side from Baton Rouge to the same point near the Head of the Passes, leaving a gap in the line of levees of 234 miles in length, from the mouth of the Yazoo River to Baton Rouge, unleveed, which levees were constructed in part by the United States and in part by the local authorities along the Mississippi River.

The extension of the general levee system by the United States and the local authorities has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly or would be subject to now if the levee system were not in existence, and consequently somewhat reduced its value for agricultural purposes. The immediate cause of the deeper overflow of claimants' land is the increased elevation of the flood heights, which is the result of the general confinement of the flood discharge by the levee system as a whole.

During the flood waters of 1882 the levees failed throughout the length of the river. In 1884 the crevasses were still open in all basins. In 1886 crevasses were open in the upper Tensas district and the levees intact in the lower Yazoo district opposite the upper Tensas. In 1887 all crevasses were closed. In 1890 there were eight crevasses in the upper Tensas and seven in the lower Yazoo district, which is in the State of Mississippi opposite claimants' land. In 1891 all 1890 crevasses were closed and the flood waters of that year made one crevasse in the upper Tensas and one in the lower Yazoo district. In 1892 all crevasses were closed, but the flood waters made six

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crevasses in the levees located along the stretch of river in the neighborhood of the claimants' land, which is located 473 miles below Cairo in the upper Tensas district, and the six crevasses were in the stretch of levee line between 439 miles and 506 miles south of Cairo. In 1893 all crevasses were closed, but the flood waters of that year made four crevasses in the levee lines located not far from claimants' land; that is, in the stretch of levee between 497 miles from Cairo and 545 miles. In 1897 all crevasses were closed, but the flood waters of that year made five crevasses in the lower Yazoo district in Mississippi, which is opposite and south of the claimants' lands. From 1898 to 1902 there were no crevasses, and only one crevasse in the upper Tensas district in 1903, and all crevasses closed in 1904 to 1910.

V.

In consequence of the closing of the natural basins, outlets, and crevasses caused by the flood waters by the United States and the local authorities of the States bordering the river on both sides, as aforesaid, the channel of said river has been scoured and many waste and overflowed lands on both sides of the river behind said levees have been incidentally reclaimed and are now protected from overflow in times of high water, and vast benefit has accrued to the States of Illinois, Kentucky, Tennessee, Mississippi, Arkansas, and Louisiana by reason of said levee construction and to the landowners of said States behind said levees, but that the lands of claimants, situated between said levees and on the outside thereof and not protected thereby, have been subjected to repeated overflow, tending to diminish and impair their value, but to what extent does not satisfactorily appear from the evidence.

A part of the levee system so constructed and maintained runs back of said Point Chicot plantation, not touching the same, and that between it and said Point Chicot plantation is a stretch of ground lower than the main body of said plantation, and in periods of high water, the water rising, passing over and upon said land, has, by reason of its lowness, first gone thereupon, and its main current was across said land and not upon Point Chicot plantation, which, while in extreme high water it would be flooded as hereinabove set forth, did not have the full force of the current of the Mississippi River thereupon, but was covered in part or in whole by slacker water.

The current during high-water seasons being as aforesaid struck against and impinged upon the said levee back of said Point Chicot plantation and protecting the lands on the interior, and such impingement resulted in the waters of said river eroding and washing away said levee, to the great danger of its existence, and threatening to break through said levee and inundate said lands to the rear thereof and divert the water from the channel of the river. Such breach or crevasse in said levee would have entailed damage thereunto and to the adjacent landowners and impaired the efficacy of said levee system as projected, constructed, and maintained by the officers

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of said Mississippi River Commission in accordance with the plans heretofore stated.

In addition to the danger which threatened the levee, said current impinging upon the banks of the stream, and the neck of land adjoining Point Chicot to the mainland, cutting into it, threatened to and would have, if permitted to continue, cut through said neck of land, thus straightening the channel and making Point Chicot plantation an island.

VI.

In order to prevent the threatened danger, both to the levees and to the integrity of the connecting neck of land, the officers and agents of the United States Government, acting under authority of
26 the acts of Congress, and the Mississippi River Commission, constructed what is known as the Leland Dike, running diagonally and at an angle from the main line of levee on the Arkansas side, across and on said land, to a point 662 feet beyond where the line of Point Chicot plantation begins, their object being to divert the current of the stream during high waters, from impinging upon said levee, and by throwing it northeastward by said dike, to prevent the destruction of the levee, and the cutting across the neck aforesaid.

Said dike first went over, into, and upon the land of claimants aforesaid a distance of 662 feet, but the end of said dike being exposed to the waters of the Mississippi River, and to the powerful current as above mentioned, the said officers and agents of the United States Government deemed it necessary to extend the same a distance of some 2,700 feet farther into and upon the land of claimants, and did so extend the same in the year 1907, without any condemnation of said land, and with no remuneration therefor being made to claimants, said officers and agents using a large part of the soil of claimants' plantation for the construction of said extension.

Before the joining of the levee lines by the United States in accordance with said Eads plan (thus making the same continuous) there were occasional overflows of the Chicot plantation, but they have been made deeper and more forceful by the adoption of said system. However, these overflows before the erection of said dike did not materially damage the same and said lands remained still valuable for agricultural purposes. Since the erection of said extension of said dike and by reason thereof the high-water current of said river has been deflected over and across a large part of said Chicot plantation, but flows in the same direction as did a portion of the high waters of the river before the erection of said dike, but with greater force and depth, the escape of a portion of the high waters over and across the neck of land connecting said Chicot plantation and the mainland being thereby prevented, in consequence of which the overflows of said plantation have been greatly increased and intensified, the result of which has been to wash and scour out its top soil and to deposit upon a large part thereof great burdens of sand and gravel,

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and 3,696 acres of said lands have thereby been rendered totally unfit for cultivation or any other profitable use by the owners thereof. This result has been caused partly by the joining of said levee systems and the erection of said dike, but directly and proximately by the erection of said dike.

VII.

The claimants are the sole owners of this claim and no action other than this has been had thereon. No other person has any interest in this claim or in said lands except one J. M. Wilzin, who is a mortgagee of this and other lands to the amount of $30,000. The claimants are citizens of the United States and have never made any assignment of this claim or any interest therein.

VIII.

The lands described in claimants' petition were conveyed to George F. Archer and James A. Deaton by deed dated the 22d day of August, 1896, for the sum of $10,500, and Mrs. Kate C. Archer
27 inherited the interest of the said James A. Deaton upon his death and later married the said George F. Archer.

On the 30th day of December, 1909, George F. and Kate C. Archer, the claimants, conveyed said lands to Herman Wilzinski, trustee, as well as other lands located in the State of Mississippi, to secure the payment to J. M. Wilzin, of New Orleans, La., of certain notes aggregating $30,000, which were that day executed and delivered to said Wilzin.

IX.

The lines of levees located on both sides of the Mississippi River from Cairo to near the Head of the Passes, a distance of 1,050 miles, which were constructed in part by the officers and agents of the United States for the purpose of improving the river for navigation and constructed in part by the officers and agents of the local organizations of the States bordering on the river to 1909 had a length of 1,548 miles and contained 229,729,354 cubic yards. Since 1909 the authorities of the United States built additional lines of levees containing 2,970,224 cubic yards, and since said year (1909) said local authorities built additional lines of levees containing 5,063,427 cubic yards, thus bringing the work of levee construction up to the year 1910.

X.

The 3,696 acres of land hereinbefore mentioned at the time of the erection of the Leland Dike was of the value of $83,920. Thirty-one and four-tenths acres of the same is actually and wholly occupied by the United States by the construction of the dike before mentioned, and the balance of said 3,696 acres, to wit, 3,664.6, has been

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destroyed and rendered totally unfit for cultivation or any other profitable use by the owners thereof, as found in Finding VI. Said 3,696 acres is described as follows:

"Beginning at an iron stake at the base of an overcup oak, 36 inches in diameter, standing upon the right bank of the Mississippi River, at the north end of the dividing line between Leland plantation and the lands of George F. Archer, March 14, 1904. Thence S. 45° E. 75 chains. (At 17 chains public road bears eastwardly; at 31 top of spur dike; at 75 chains came to iron post on right bank of Mississippi River.)

"Thence up said right bank N. 68° E. 120 chains to the right bank of Old River. (This line is along the edge of the high land and large cottonwoods from 5 to 9 chains from the water's edge.)

"Thence up the right bank of the said Old River N. 17° E. 90 chains. Thence N. 23° E. 84 chains to where said Old River forks into two small channels. (The last two courses are from 1 to 3 chains up on the high bank on the west or right bank of said Old River.)

"Thence up the west fork or prong of Old River on its right bank N. 62° W. 55 chains. Thence N. 80° W. 47 chains to the east point of a small levee (seems to have been erected many years ago).

"Thence on the north side of said levee S. 89° W. 20 chains to the right bank of the Mississippi River on a caving bank.

28 "Thence up said right bank of the said river and at a distance of from 1 to 5 chains from the caving bank S. 23° W. 80 chains. This stake is 1 chain east of the caving bank.

"Thence continue up said right bank from 1 to 5 chains east of it, S. 33° W. 80 chains to a stake, 2 chains and 75 links south and east of the high bank of the river.

"Thence S. 39° W. 61 chains to the point of beginning."

XI.

The court finds as an ultimate fact, in so far as it is a question of fact, that the said 3,696 acres of land was somewhat impaired in value by the construction of said levee system, but that its use was totally destroyed by the erection of the Leland Dike and was thereby taken, its value at the time of such destruction and taking being $83,920.

XII.

Before this suit was brought in this court, George F. Archer, one of the claimants, brought a suit in the United States Circuit Court for the Eastern District of Arkansas against the board of levee inspectors of Chicot County, Arkansas, for the damages arising from the erection of said dike and the taking of said 31.4 acres of land, and a demurrer by the defendants to the complaint in said suit was overruled (128 Fed. Rep., 125); and thereafter and before the beginning of this suit said George F. Archer discontinued said suit brought against said board.

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CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to judgment in the sum of fifty-four thousand nine hundred and twenty dollars ($54,920).

OPINION.

BARNEY, J., delivered the opinion of the court.

This case now comes before this court upon motions for a new trial by both parties. Upon the hearing of these motions a new trial was allowed, and the whole case was heard and considered on its merits. The former findings and opinion have been withdrawn and new findings made, and this revised opinion is submitted.

This is a suit to recover damages for the "taking" of the lands of the claimants by the Government in the construction of the improvements on the Mississippi River. The claimants are the owners of a plantation containing about 6,000 acres in the State of Arkansas and situated within a bend on the Mississippi River and comprising nearly all of the land within said bend. Before the Government began its improvements upon this river the local authorities at different points along its course below Cairo, Ill., had built levees, the purpose of which was to prevent the river at its high stages from overflowing the lands in their rear. It does not appear that these locally constructed levees materially raised the flood of the river at any point, but that the surplus waters found their way through numerous openings into basins of large area, and thence into the Gulf. During periods of high water the lands of the claimants had always been subject to occasional overflow, but not to such an extent as to materially impair their value. The levees constructed by local authorities, and afterwards adopted and added to by the Government, as hereinafter stated, were located at places considerably back from the river so as to leave between them and the river, or as might be said between the levees on both sides of the river, lands which were not affected by them unless the flood tide of the river was permanently raised. The lands in question in this case belonged to that class.

29 Before the Government began its improvements the local authorities had built a levee, a fragment of which is shown upon the map following, and which it will be seen was situated somewhat back from the claimants' plantation and from the narrow neck of land joining their plantation to the mainland.

In 1883 the Government began the work of improving the navigation of the Mississippi River, and has continued it ever since. The plan adopted seems to have been to adopt the local levees as far as practicable from Cairo down, to build new levees in intervening spaces, and thus unite them into one complete system for raising the waters of the river by confining it within a narrower channel and preventing its partial escape into the basins before mentioned. This

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object has been and is being further accomplished, and it appears that its waters have thus been raised approximately 6 feet in times of high water. This result has been to greatly improve and raise the value of much territory outward from this system of levees, but to cause more frequent overflow of the lands left between them and the river. It appears, however, that notwithstanding this apparent result of the river improvements the plantation of the claimants was sufficiently above the flood tide of the river to remain valuable agricultural lands and to be subject only to occasional overflow.

It appears that in 1903–4, in order to prevent threatening danger to the levee near the neck of land connecting the plantation of the claimant and the mainland, as well as to preserve the integrity of the neck of land itself and prevent the river from cutting through it, the Government constructed a "dike," hereinafter called the Leland Dike, running diagonally out from the main line of the levee and extending 662 feet upon the Chicot plantation. In the period of high water of 1904 this dike was partially destroyed and claimants' plantation considerably injured, whereupon in 1907 the Government extended said dike further to the northeastward, and so far that it went 2,700 feet still farther into and upon the claimants' plantation. The effect of said dike at times of high water is to deflect the flood waters of the river to the eastward over and across a large portion of claimants' plantation in such volume and with such force as to scour out and destroy much of its top soil, wash away the tenant houses which were situated thereon, and leave a deposit of sand and gravel on its surface, which has already totally destroyed its value for agricultural purposes (and it has no other); and it is unnecessary to state that this deposit will increase from year to year.

This description of the locus in quo will be better understood by an examination of the map herein. The land to the northeast of the line marked "Leland line" is the farm of the claimant, the line colored yellow is the levee, and the pink line A–B is the dike mentioned. The land submerged with sand and gravel is situated within the fretted dark line northeastward of the dike.

From this statement it will be seen that there is no question but that this land so destroyed has been "taken" within the meaning of the fifth amendment to the Constitution, and the only question before us is whether the Government is liable for this taking.

It is contended by the Government that it is not liable for this taking of the claimants' lands for the reason that the levees in question were partly constructed by the local authorities, so that the taking was not alone by the United States, but jointly with others. It is argued that such a joint taking is not a taking by the United States within the meaning of the amendment referred to. While the findings show that Point Chicot plantation was more frequently and deeper overflowed in consequence of the extension of the levee system by the United States, no part of it was destroyed nor materially damaged until the dike was extended and erected. Hence it can not be said that claimants' land was taken in

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consequence of the levee system, but directly in consequence of the erection of the dike, and that was the work of the United States alone. In this connection it should also be remarked that the levee system as constructed and kept up by the local authorities had not materially damaged these lands, and it was not until this system had reached "the state of completion which now exists" and said dike had been erected that they were inundated with sand and gravel. (Findings II and VI.) Hence, both by the construction of the dike and the completion and joining as a whole of this levee system, the United States alone has taken the claimants' lands. This joining of the locally constructed levees and erection of the dike was in furtherance of the Government project alone—the confinement of the river within its banks and thereby to improve navigation.

At the time of the erection of the Leland Dike the injury to the plaintiffs' land, which had theretofore been caused by the joining of the levee system, was consequential only and had not amounted to a taking, and hence is immaterial to be computed in this case, the Government's liability beginning at the time of its absolute destruction. It is true that the flood heights of the Mississippi River had been raised by the joining together as a whole of the levee system, and that this fact made the erection of the Leland Dike more destructive to the plantiffs' land than it otherwise would have been, but the findings show, and it is not denied, that the erection of the dike was the proximate cause of the flooding of Chicot plantation with sand and gravel. It would be a travesty upon justice to maintain that the Government is exempt from paying for this destruction because some prior injuries inflicted, not amounting to a taking, had accelerated and assisted in this destruction.

There may well be other cases where the overflow and damage are directly caused by the joint action of the Government and local authorities, and in such cases the question raised by the Government will arise and must be decided, but for the reasons given is not believed to be in this case.

It is further contended by the Government that this case comes within the decision of the Supreme Court in the Bedford case (192 U. S., 217), and that under that decision the petition should be dismissed. In that case a revetment was constructed by the Government authorities along the banks of the Mississippi River at Delta Point, La., for the purpose of preventing the further erosion of that point. As a result of this revetment the integrity of the bank at that point was maintained, and the channel and current of the river were gradually directed toward the lands of the claimants situated about 6 miles below, and after the expiration of several years eroded and overflowed about 2,300 acres of their lands. In the opinion in that case it is said:

"* * * The object of the works was to preserve the conditions made by natural causes. By constructing works to secure that
31 object appellants contend there was given to them a right to compensation. The contention asserts a right in a riparian

proprietor to the unrestrained operation of natural causes, and that works of the Government which resist or disturb those causes, if injury result to riparian owners, have the effect of taking private property for public uses within the meaning of the fifth amendment of the Constitution of the United States. The consequences of the contention immediately challenge its soundness. What is its limit? Is only the Government so restrained? Why not as well riparian proprietors; are they also forbidden to resist natural causes, whatever devastations by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the Government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. Asserting the rights of riparian property it might make that property valueless. Conceding the power of the Government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility * * *."

In accord with the rule of law thus stated it would have been within the rights of the claimants to have constructed this dike if necessary to protect their lands from the ravages of the river, or for the Government to have constructed like works along the banks of the river for the improvement of navigation. But it seems to us an entirely different thing and not within the principle laid down in that case for the Government to invade the lands of the claimants and construct a dike thereon more than a quarter of a mile from the bank of the river, extending upon the same over 3,000 feet and covering more than 31 acres of land. It appears that this was done for the purpose of protecting the levee at the inner end of the dike, as well as to prevent the river from cutting through the narrow neck of land at that point, and if it had resulted in causing the overflow and taking of other lands than the claimants' situated farther down the river, the parties thus injured would have been without redress under the decision in the Bedford case. But in the case at bar it is admitted that the Government went upon the lands of the claimants and took possession of more than 31 acres, and constructed thereon a work which directly caused the taking of 3,664.6 acres more. We think it is not and can not be denied that the Government is clearly liable for the taking of this 31 acres; and if so, why is it not just as liable for the taking of the balance which was the result of the first taking? In fact, it may be said all of the lands mentioned were taken at the same time and by the same act.

We believe that the rule laid down in the recent case of United States v. Grizzard (219 U. S., 180), is particularly applicable to this case. In that case there was an undisputed actual taking of a part of the farm of the defendant in error by permanently flooding the same, and, as an incident of such flooding, a public road running across the flooded part was also flooded. The court below had

divided the damage by reason of the flooding of a part of the farm and the destruction of the easement, allowing $750 for each. The Supreme Court affirmed this judgment, and in so doing established the rule that "Whenever there has been an actual physical taking of a part of a distinct tract of land the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted." (Id., 183.)

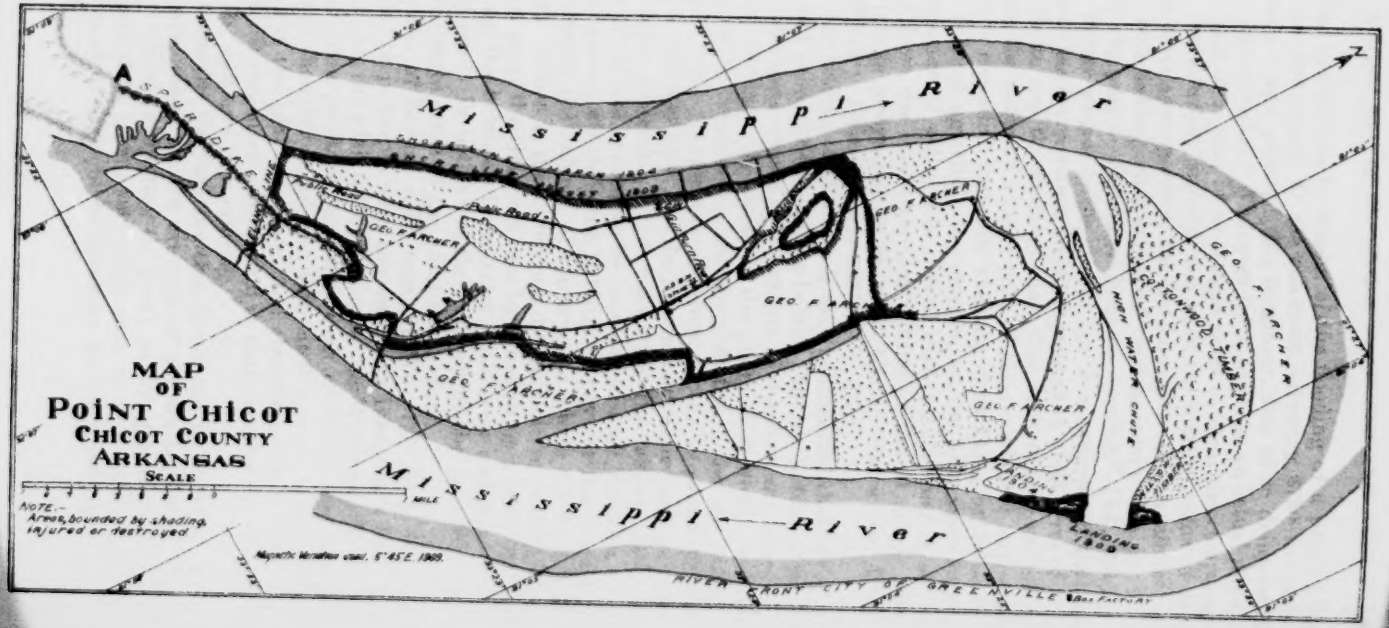
32

As before stated, in the case at bar it is undisputed that the Government has taken actual physical possession of 31 acres of the plaintiff's farm, and the findings show that such taking has entirely destroyed the value of a large part of the remainder; and whether or not it is conceded that this absolute destruction of value by itself alone is a taking within the meaning of the fifth amendment of the Constitution, it will not be denied that this destruction of value resulted from the actual physical taking of the 31 acres. The same principle is recognized in Sharp v. United States (191 U. S., 341) and Welch v. United States (217 U. S., 333).

In the decision of this case it may be admitted that if the Government had owned the site of the Leland Dike at the time of its erection, or if it had been owned by a stranger to this suit, and hence had made no invasion upon the lands of the plaintiff, it would not have been liable for the destruction thereby inflicted, under the ruling in the Bedford case. Under the decisions of the Supreme Court in all cases of this character, it is the invasion upon the lands and the actual and visible possession which constitutes the taking, and when thus taken all of the consequences incident to such invasion necessarily follow, among which is the liability to pay for the damage thereby occurring to the balance of the tract to which the land thus taken belongs. What is the difference in principle in cutting off a right of way, as in the Grizzard case by inundating it with water, and in covering the balance of the tract with sand and gravel as in the case at bar? In both cases the invasion of the plaintiffs' lands was the proximate cause of the additional injury.

The case of Barden v. Portage (79 Wis., 126; 48 N. W. R., 210) is identical in principle with this case. In that case a levee was constructed on the plaintiff's land upon the Wisconsin River, and terminated at a point thereon, the result of which was to gather the waters of the river and deflect them at this point of termination over and upon the plaintiff's land and thereby cover it with sand and gravel. It was unanimously held in that case that the defendant was liable for damages thus ensuing.

To maintain the doctrine that lands can be invaded and a tract admittedly taken for the erection of a work to change the flow of waters, without subjecting the party so doing to the payment for all the lands thus taken, including such as are incidently destroyed, would appear to us to be shocking to every principle of law and justice.



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Judgment will be entered for the plaintiff in the sum of $54,920, but before the judgment is certified the rule stated in Heyward v. United States (46 C. Cls., 484), as to the survey and conveyance of the lands taken, and possible correction of the judgment, will be followed.

33 [Illustration.]

34 X. *Judgment of the court.*

GEORGE F. ARCHER AND KATE C. ARCHER
vs.
THE UNITED STATES. } No. 30471.

At a Court of Claims held in the city of Washington on the 27th day of October, 1913, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimants and do order, adjudge, and decree that the claimants, George F. Archer and Kate C. Archer, do have and recover of and from the United States the sum of fifty-four thousand nine hundred and twenty dollars ($54,920), but before the judgment is certified the rule stated in Heyward v. United States (46 C. Cls., 484), as to the survey and conveyance of the lands taken, and possible correction of the judgment, will be followed.

BY THE COURT.

35 XI. *Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 16th day of February, 1914, in favor of claimants, the defendants, by their Attorney General, on the 24th day of February, 1914, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed February 24, 1914.

Ordered, That the above appeal be allowed as prayed for.

BY THE COURT.

February 24, 1914.

36 Court of Claims.

GEORGE F. ARCHER AND KATE C. ARCHER
vs.
THE UNITED STATES. } No. 30471.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in this cause; of a history of the proceedings in said cause; of the order of the court

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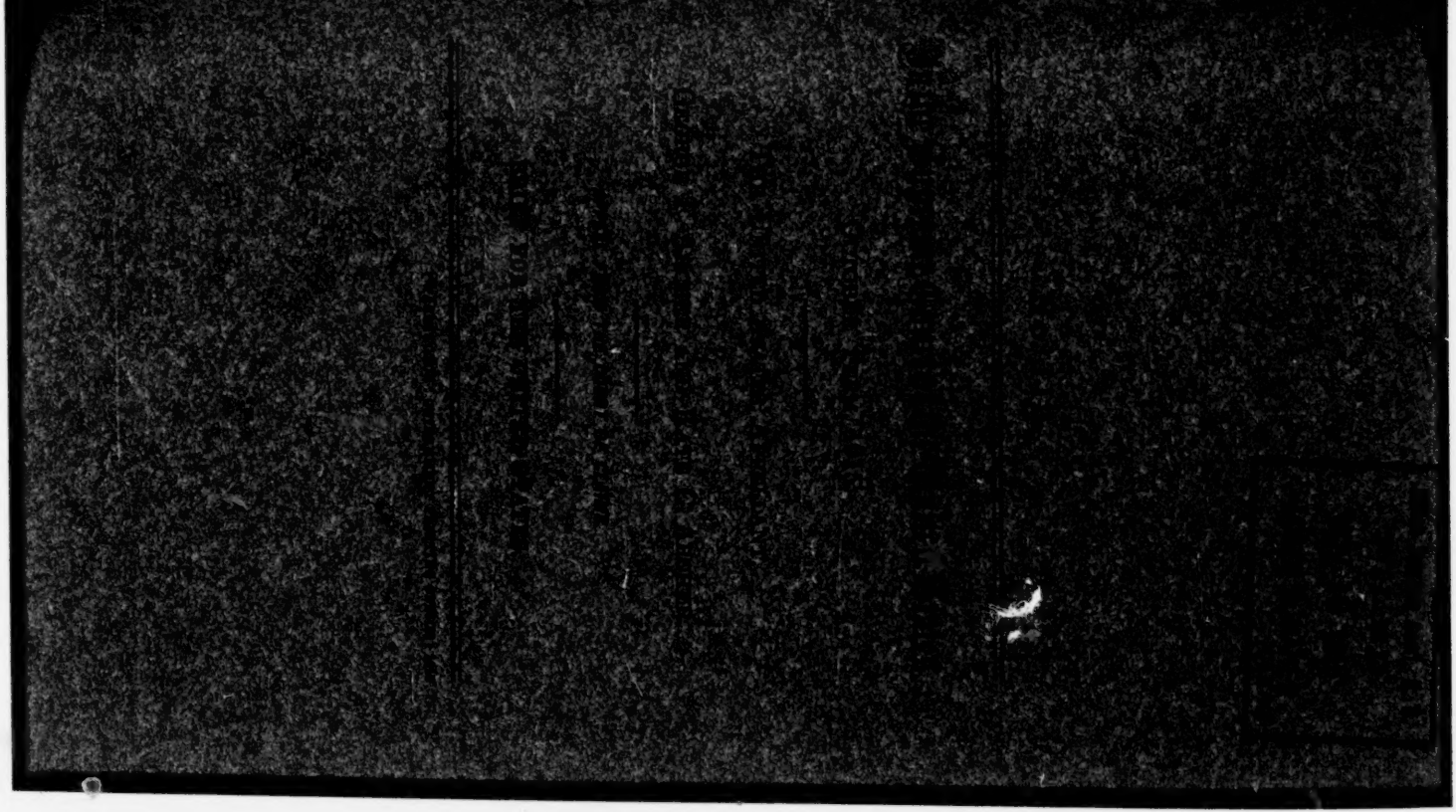
overruling defendants' motion for a new trial and reducing the judgment, and of the dissent of Booth, J., thereto; of the history of further proceedings in said cause; of the order of court allowing in part and overruling in part defendants' motion to amend findings; of the findings of fact, as amended, filed February 16, 1914, nunc pro tunc as of February 12, 1912, of the conclusion of law and opinion of the court; of the judgment of the court; of the application of the defendants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 17th day of March, A. D. 1914.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsed:) File No. 24126, Court of Claims. Term No. 975. The United States, Appellant, vs. George F. Archer and Kate C. Archer. Filed March 23d, 1914. File No. 24126.



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In the Supreme Court of the United States.

OCTOBER TERM 1915.

THE UNITED STATES, APPELLANT,
v.
GEORGE F. ARCHER AND KATE C. ARCHER. } No. 112.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case grows out of levee construction on the lower Mississippi River. It is before the court on appeal by the United States from the judgment of the Court of Claims awarding $54,920 damages for injury to claimants' plantation from overflow of the river (47 Ct. Cls. 248; R. 9, 18).

From the findings of the Court of Claims the following facts appear: The plantation, described as "Point Chicot Plantation," is situated in Chicot County, in the southeastern corner of Arkansas. It is in a bend, bounded on the north, east, and west

by the river. Behind the Point Chicot Plantation to the south was a levee, a part of the general system constructed by the United States and local authorities after 1883, pursuant to the Ead's plan for the improvement of navigation (R. 12, 13, 14). Between the levee and Point Chicot Plantation was a low strip of ground often covered by the river (R. 14). The natural current of the river in high water seasons running over the low strip of ground behind the Point Chicot Plantation threatened the destruction of the levee (R. 14); and a severance of the Point from the mainland, leaving Point Chicot an island (R. 15). To forestall the danger to the levee from erosion, and to the connecting neck of land, and thus to prevent the river from leaving its channel, agents of the United States Government constructed the Leland Dike in 1904, running 662 feet into the Point Chicot Plantation. In 1907 the dike was extended 2,700 feet further on claimants' land (R. 15). In all, 31.4 acres were occupied in the construction of the Leland Dike (R. 16; Finding X). The dike had the effect of continuing the waters of the Mississippi in the same general direction that they were wont to go. In periods of high water the floods deflected by the dike came over the plantation, rendering 3,696 acres of the plantation unfit for cultivation (R. 15, 16; Finding VI).

From the findings it appears that the causes of the damage were diverse:

> * * * Since the erection of said extension of said dike and by reason thereof the

high-water current of said river has been deflected over and across a large part of said Chicot plantation, but flows in the same direction as did a portion of the high waters of the river before the erection of said dike, but with greater force and depth, the escape of a portion of the high waters over and across the neck of land connecting said Chicot plantation and the mainland being thereby prevented, in consequence of which the overflows of said plantation have been greatly increased and intensified, the result of which has been to wash and scour out its top soil and to deposit upon a large part thereof great burdens of sand and gravel, and 3,696 acres of said lands have thereby been rendered totally unfit for cultivation or any other profitable use by the owners thereof. This result has been caused partly by the joining of said levee systems and the erection of said dike, but directly and proximately by the erection of said dike. (R. 15, 16; Finding VI.)

In consequence of the closing of the natural basins, outlets, and crevasses caused by the flood waters by the United States *and the local authorities of the States* bordering the river on both sides as aforesaid, the channel of said river has been scoured and many waste and overflowed lands on both sides of the river behind said levees have been incidentally reclaimed * * * but that the lands of claimants, situated between said levees and on the outside thereof and not protected thereby, have been subjected to repeated overflow, tending to diminish and impair their value,

but to what extent does not satisfactorily appear from the evidence. (R. 14; Finding V.) (Italics ours.)

The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water and to scour and deepen the channel of the Mississippi River and thereby improve it for navigation, and the purpose of the officers and agents of the State and local authorities constructing lines of levees at various places along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing the waters being confined within a narrower compass, as above indicated, have by laws of nature attained a higher elevation of approximately 6 feet in times of high water. (R. 13; Finding IV.)

* * * The lands of the claimants in controversy * * * have been occasionally overflowed at times of high water, as stated in Finding II, before as well as since the construction of levees. (R. 13; Finding IV.)

The extension of the general levee system by the United States and the local authorities has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly or would be subject to now if the levee system were not in existence, and consequently somewhat reduced its value for agricultural purposes. The immediate cause of the deeper overflow of claimants' land is the increased elevation of the flood heights, which is the result of the general

confinement of the flood discharge by the levee system as a whole. (R. 13; Finding IV.)

Claimants' land was overflowed frequently prior to the construction of the dike, as appears from Finding II, R. 11, as follows:

> The Point Chicot plantation has been overflowed whenever the water surface rises to 135 feet, Memphis datum, and said lands have been more or less overflowed every year except two, 1872 and 1889, during the 18 years prior to 1891, up to which time the levee system had not been completed sufficiently to withstand great floods and the outlets unclosed; and during the 20 years following 1891 after the levee system had been made effective and the outlets closed by the United States and the local authorities, there were 8 years, namely, 1894, 1895, 1896, 1900, 1901, 1902, 1905, and 1910, during which the claimants' land was not overflowed.
>
> The claimants' Point Chicot plantation is overflowed at a stage of 38 feet on the Greenville gauge, or whenever the water surface rises to 135 feet, Memphis datum, and the gauge readings show that of the 15 years from 1882 to 1896, inclusive, there were only 4 years in which this stage was not exceeded, and that of the 14 years from 1897 to 1910, inclusive, there were 5 years in which this stage of 38 feet on the Greenville gauge was not exceeded.

Claimants' petition was filed July 19, 1909. The record discloses many subsequent proceedings by way

of findings and judgments, motions to amend, and amendments. On November 19, 1913, defendant filed a motion for new trial, urging as one ground that the 31.4 acres occupied by the Leland Dike had been previously taken by the Chicot County Levee Board. The grounds for the motion for new trial do not appear in the present record. The motion was denied (R. 9).

The Court of Claims awarded judgment not only for the value of the 31.4 acres actually covered by the dike but also for the 3,664.6 acres injured, relying on *United States* v. *Grizzard*, 219 U. S. 180 (R. 18, *et seq.*). In allowing recovery for the injury to the unoccupied area, the court admitted that if in the construction of the Leland Dike no part of claimants' land had been invaded, recovery should have been denied altogether. BOOTH, J., dissenting, said (R. 9):

> I think this case comes within the decision of the Supreme Court in the Jackson case, No. 18274, and Hughes case, No. 30606, recently decided. There is a liability for the lands actually taken and upon which the improvement rests. I think the judgment should be strictly limited thereto.

Liability for the 31.4 acres actually occupied in the construction of the Leland Dike is neither admitted nor denied by the Government, since, if there shall be a new trial herein, it may be made to appear that this land had been previously taken by the State authorities. It is conceded, however, that upon the findings of fact now before the court this

question of fact is not open. The specific error by reason of which a reversal is demanded is the imposition of damages for injury to the land not so occupied. The question at issue is simply this:

If the Government occupies a portion of a tract of land in the construction of a dike as part of the lower Mississippi levee system, in order to prevent destruction of a levee previously constructed, and to prevent the river from leaving its natural channel, is the Government liable for damages to the balance of the tract from overflows in flood periods?

ARGUMENT.

LIABILITY OF THE GOVERNMENT FOR DAMAGES IS LIMITED TO LAND ACTUALLY OCCUPIED BY THE LELAND DIKE.

1. The Jackson case, 230 U. S. 1, and the Hughes case, 230 U. S. 24, are controlling.

In *Jackson* v. *United States*, 230 U. S. 1, 23, Chief Justice White said:

> * * * We say this because the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open.

If the Leland Dike had been constructed on no part of claimants' land it is clear that there would have been no liability for the damage in this case. The injuries are consequential and remote.

This appears from several considerations. The damages resulted from future overflowings and are remote in point of time. The plantation was subject to overflow in high-water periods prior to the construction of the general levee system. The extent of damage from overflow after the construction of the levee system "does not satisfactorily appear from the evidence" (R. 14). Subsequent to the construction of the Leland Dike in 1904 and 1907, the damage from the "high-water" currents at any one time or in any one year does not appear (Finding VI; R. 15).

The damages, moreover, result from a combination of diverse causes. These causes were the levee system as a whole, constructed by the State and National authorities, the higher flood level due thereto, the Leland Dike, which prevented the river from altering its natural course, the recurrent overflows, and especially the lack of levee in front of and protecting claimants' land. In ultimate analysis claimants' grievance is that the Leland Dike was not constructed on the river bank in front of their plantation. In their petition it is alleged:

> * * * That your petitioners from their private means have been unable to levee their said lands by private levees, and to so protect them from the increased elevation of the river. (R. 4.)

That there is no duty on the part of the United States so to build a levee in front of riparian owner's land as to protect it from overflow is held in *Jackson* v. *United States*, 230 U. S. 1. In that case the general

geographical and historical situation is clearly set forth, from which it appears that the damages in the case at bar are too remote to amount to a "taking." In the *Hughes* case, 230 U. S. 24, recovery was denied for the damages to Timberlake plantation caused by overflows superimposing sand and gravel on the plantation and rendering it valueless. In that case the injury was occasioned by the construction of the levee behind the claimant's land, the *sine qua non*, but not the legal cause of the damage. In the *Hughes* case, the court said (p. 32):

> * * * We say this because the claims in the *Jackson Case* as well as the claim in this case made as to the Wigwam plantation in their last analysis but involve the assertion of a right of recovery against the United States for failing to build a levee in front of the plantations in question for the purpose of affording them protection from the increased stage of high-water which it was asserted had been created by the act of the United States in building levees elsewhere along the river.

Finally, the construction of the dike in exercise of the power of the Federal Government over navigable rivers was lawful. See *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251. It is claimants' misfortune that their ownership of the riparian lands was inherently subject to remote damage from overflows occasioned by the construction. In *Bedford* v. *United States*, 192 U. S. 217, the building of a revetment for the purpose of preventing erosion to De Soto

Point, deflecting the river against claimant's land and occasioning its washing away, was held not to subject the United States to liability. In the case at bar the Leland Dike was constructed to prevent erosion of a levee already constructed, . . prevent the river from leaving its natural channel.

The Court of Claims recognized the consequential and remote character of the damage to the unoccupied portion of Point Chicot Plantaton. It said (R. 22):

> In the decision of this case it may be admitted that if the Government had owned the site of the Leland Dike at the time of its erection, or if it had been owned by a stranger to this suit, and hence had made no invasion upon the lands of the plaintiff, it would not have been liable for the destruction thereby inflicted under the ruling in the Bedford case.

2. Occupancy of part of claimants' land creates no liability for remote damages to the balance.

In *United States* v. *Grizzard*, 219 U. S. 180, the basis of the decision below, the general rule of damages is enforced, that the taking of a part of a tract must be considered in relation to its effect upon the whole. The rule is stated by Mr. Justice Lurton as follows (p. 183):

> * * * Since, therefore, there has been a taking of a part of the owners' single tract and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of

> the use of the taken land, the rule applied in the cases cited does not control this case.
>
> * * * Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.

In that case, the submerging of a part of plaintiff's land had the effect of shutting off an easement of access to a road. The taking *per se* depreciated the value of the balance of the tract. The loss from the taking could be justly measured, not by considering the part as an isolated tract but only as a part of the whole.

A quite usual application of the rule is found in railroad condemnation cases. A right of way through a farm may leave the severed part so small as to be unprofitable for cultivation. The use of the right of way may render access to buildings on both sides inconvenient, or increase the risk of fire from sparks. See *Sharp* v. *United States*, 191 U. S. 341; *Railroad Co.* v. *Hopkins*, 90 Ill. 316; *Railroad Co.* v. *Roskemmer*, 264 Ill. 103.

The rule in the *Grizzard* case, however, is not applicable in the case at bar. The occupation of 31.4 acres did not in and of itself make the balance of the tract less fit for cultivation. No right of access was

cut off. No inconvenience to the owners resulted. The Government proposed no use of the strip occupied, for military purposes or otherwise, which would endanger life or property or make the balance less valuable. See *Peabody* v. *United States*, 231 U. S. 530. True, the damage to the farm by reason of overflowings of the Mississippi was rendered more probable. But the dike was only one of the occasions, not the legal cause, of resulting damage, as has been seen.

In *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, the taking of riparian land was held not to subject the United States to liability for incidental injury to water-power rights. Liability for the water-power right was examined as a separate question. Recovery was denied, on the ground that the Government was simply making use of its superior interest in the property for the improvement of navigation.

The precise point has been decided in favor of the Government's contentions. In *Board of Levee Commissioners* v. *Harkleroads*, 62 Miss. 807, a Mississippi Board of Levee Commissioners took a strip of a plantation for the construction of a levee under an act which provided compensation for the "value of the property (taken) and the damages sustained." It was held that damages should be awarded for land actually taken "considered as a part of the whole tract," but nothing for the injury from overflows to the land unprotected by the levee. The court said (p. 813):

> Applying this rule to the facts of this case, we think the appellee is entitled to have the fair market value of the land actually taken, considered as a part of the whole tract, and the damages resulting to his curtilage by reason of the fact that it was intersected by the levee; and the damages resulting from the depreciation in value of the small body of land situated between the levee and the bayou in rear thereof, and cut into such shape as to be unfit or inconvenient for cultivation; and the damages suffered by the filling of his natural and artificial drains, this to be limited by the costs of opening others answering to those closed if that be practicable; *and that he is not entitled to any damages arising from the fact that a part of his farm is not protected by the line of levees as located;* * * *
>
> The overflowing water of the Mississippi River is the enemy of the public, and the State in assuming to deal with the danger arising therefrom has not provided for compensating the owners of lands lying along the borders of the river for any injury which may incidentally and possibly arise from confining the waters within the limits fixed by the line of levees. (Italics ours.)

The case was followed in *Richardson* v. *Levee Commissioners*, 68 Miss. 539. Here the statute provided for compensation, as follows (p. 540):

> The cash value of land or material occupied or used, * * * for the right of way of said levee, or for other levee purposes, and also the damages caused to the owner's

> adjacent property by reason of the use of his land or other property for right of way for said levee, or for other levee purposes.

The levee was constructed on part of plaintiff's tract. On the unprotected side were left buildings near the river bank. It was held that no recovery could be had "for damages to the land lying between the new levee and the river, caused by its exposure to overflow, nor for the expense necessary in removing houses from the unprotected to the protected side of the new levee." The court said (p. 549):

> The land-owner is not entitled to damages, because of a failure to so place levees as to protect his land from the water of the Mississippi, or because the levee may prevent such water from flowing off as it otherwise would, and may deepen the water in an overflow on the land between the embankment and the river. These are consequences of the situation and the authorized effort to promote the general good by the construction of levees, and must be borne, because they are unavoidable in the nature of things.

In *McCoy* v. *Board of Directors of Plum Bayou Levee District*, 95 Ark. 345, a levee was constructed partly on plaintiff's land. For the land actually occupied damages were awarded and paid (p. 348). For the incidental damage to the tract from overflow between the levee and the river, recovery was denied. The Arkansas Constitution provided for compensation, as follows:

> * * * private property shall not be taken, appropriated or damaged for public use without just compensation therefor. (Art. 2, §22, Constitution of 1874.)

The force of this case is more fully appreciated when it is seen that the Supreme Court of Arkansas consistently applies the rule that in consideration of damages for property taken, the tract as a whole, not merely the part taken as an isolated piece, should be taken into account. *Railway Co.* v. *Hunt*, 51 Ark. 330; *Railway Co.* v. *Allen*, 41 Ark. 431; *Fort Smith etc. Co.* v. *Schulte*, 109 Ark. 575.

In *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320, it was held that recovery could be had for land actually occupied in the construction of a lock and dam for the improvement of the Kentucky River, but not for damages which might result to adjacent property by reason of overflow. Judge Lurton, afterwards Mr. Justice Lurton, delivering the opinion of the Circuit Court of Appeals, drew the distinction between injury to the whole tract resulting *per se* from a taking of a part thereof, and the incidental, remote damages which might thereafter arise from flood waters. He said (pp. 323, 326):

> The several assignments of error present substantially but one question, and that is, whether the district judge erred originally in instructing the commissioners "not to consider any damages that may result to adjacent property of the defendant by reason of any overflow, or any other damages that may re-

sult by the construction or operation of said lock and dam." The anticipated diversion of the current of the stream from one side of the river to the other, thereby inconveniencing the conduct of the business of the High Bridge Lumber Company, and the anticipated raising of the level of the stream causing overflows and a consequent damage to its mill machinery and to the use of its adjacent lands for the purposes of its business, are manifestly injuries not directly the result of the taking of the small parcel desired by the government, but damage anticipated as consequent upon the construction and maintenance of a lock and dam in the Kentucky river. * * *. The question at last is this: Do such damages constitute, within the meaning of the constitutional limitation upon the taking of private property for public uses, any part of the value of the land condemned, or any part of that "just compensation" which the owner is entitled to demand before he can be deprived of his property?

The commissioners have already allowed satisfactory compensation to the owner for any impairment of the value of the remainder of its land by reason of the relation of the part taken to the remainder of the owner's tract. This was obviously just. A strip carved out of a tract, in such a way as to divide the remainder, might very seriously affect the enjoyment of the parts not taken.

* * * * *

What we hold is: First, that a mere temporary flooding, not amounting to a "taking,"

> and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. That such injuries are apprehended in respect of lands of plaintiff in error not condemned gives no greater right to recover than if the purpose was to construct the proposed dam on the land of a third person.

The opinion in the *Grizzard* case was written by Mr. Justice Lurton and the *High Bridge Lumber* case was twice cited with approval. 219 U. S. 180, 182, 185. That the rule of the *Grizzard* case requiring consideration of the part taken in relation to the whole does not require compensation for injuries from subsequent floods to the balance of the tract, but rather that the question is whether the flooding in itself in each instance constitutes a "taking," seems clear. The injuries from the high-water current to that part of claimants' plantation not covered by the dike did not amount in this case to a taking. The same reasoning by which this result is reached requires a holding that the damages are too remote a consequence of the building of the Leland Dike to be considered as incidental damages resulting from the construction of the dike, from which liability is incurred for the land occupied.

The value of the land taken must be fixed as of the date it is taken. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76. Whether overflows will come in the future or not, and to what extent,

can not be ascertained. Damages therefrom are remote in time and in law.

The similarity between the findings of the Court of Claims in the present case and in the *Hughes* case is striking. Indeed, in allowing recovery for the Timberlake plantation in the *Hughes* case the Court of Claims relied on the *Grizzard* case and its own opinion in this case. See Record in *Hughes* case, p. 16. This case seems only an attempt to secure reconsideration of the points settled by the *Jackson* and *Hughes* cases.

CONCLUSION.

The judgment of the Court of Claims should be reversed, and the cause remanded.

JOHN W. DAVIS,
Solicitor General.

ROBERT SZOLD,
Attorney.

NOVEMBER, 1915.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 112.

THE UNITED STATES, APPELLANT,

vs.

GEORGE F. ARCHER AND KATE C. ARCHER,
APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

PERCY BELL,
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Statement of Facts and Position of Claimants.

Appellees wish in the beginning to emphasize the fact that this is not what is commonly denominated an overflow case nor what may be termed a levee construction case. It has no relation with or similarity to the Jackson and Hughes cases. In fact, it is almost *sui generis*. The case

In

grows out of the taking by the representatives, agents, and officials of the United States Government of 31.4 acres of land of the claimants without any condemnation thereof and without any payment therefor, and erecting thereon a spur-dike for the express purpose of deflecting the flood waters of the Mississippi River from the course theretofore pursued by them in order to protect the main line of levee on the Arkansas shore of the Mississippi River.

This dike so constructed succeeded perfectly in the purpose for which it was erected—deflected the flood waters which prior thereto had been impinging upon and threatening to destroy said main-line levee, and threw said deflected waters, heavily freighted with sand, gravel, and detritus, directly upon that part of the plantation of claimants then in cultivation and immediately joining that portion of the plantation which was occupied by the dike, said waters scouring and washing out part of the top soil of said plantation, and then, losing velocity upon meeting obstruction, deposited upon a large portion thereof great burdens of sand and gravel, rendering 3,664.6 additional acres thereof totally unfit for cultivation or any other profitable use by the owners thereof (R., 15).

Claimants do not base their claim upon any raising of the flood levels of the Mississippi River, although it is stated by them and was found as a fact by the lower court that the high-water flood level of the Mississippi River had been raised six feet by the completion of the general levee system.

Claimants recognize the fact that the right of the United States Government to complete the levee system and maintain the same is indisputable, and that any purely incidental injury which might have resulted to them solely from raising the flood level would be a *damnum absque injuria*. They claim nothing by reason of said fact, adducing the same merely by way of inducement as showing that the ruin, which would inevitably have come to their plantation from the deflecting thereon of the flood waters by the construction of Leland Dike, was merely accelerated and ex-

pedited but not caused by the raising of the flood level. Their claim is that the deposit of sand and gravel and the destruction of their lands thereby were a direct and immediate result of the construction of the dike which was built on their plantation, using a part of it for the base thereof and the material thereof, and constructing the same without any condemnation of their lands; that this constituted a direct, physical invasion of their lands and ouster of them therefrom, which with the destruction constituted the taking of their lands within the meaning of the fifth amendment, and entitled them to compensation therefor. They direct the attention of the court to the findings of fact of the Court of Claims, particularly Nos. 1, 5, 6, 10, and 11 (R., 10, 14, 15, 16, and 17), as quoted below, and to the opinion of the Court of Claims, including the map of the *locus in quo:*

> "Claimants herein, George F. Archer and Kate C. Archer, were, in the year 1903, have been since and are now, the owners in fee of those lands lying and being situated in Chicot County, Ark., and described as 'Point Chicot Plantation,' being that tract of land opposite the town of Greenville, Miss., bounded on the north, east and west by the waters of the Mississippi River and on the south by 'Leland Plantation' * * * 'and comprising 6,000 acres, more or less.'
>
> "I.
>
> "A part of the levee system so constructed and maintained runs back of said Point Chicot plantation, not touching the same, and that between it and said Point Chicot plantation is a stretch of ground lower than the main body of said plantation, and in periods of high water, the water rising, passing over and upon said land, has, by reason of its lowness, first gone thereupon, and its main current was across said land and not upon Point Chicot plantation, which, while in extreme high water it would be flooded as hereinabove set forth, did not have the full force of the current of the Mississippi River thereupon, but was covered in part or in whole by slacker water.

"V.

"The current during high-water seasons being as aforesaid struck against and impinged upon the said levee back of said Point Chicot plantation and protecting the lands on the interior, and such impingement resulted in the waters of said river eroding and washing away said levee, to the great danger of its existence, and threatening to break through said levee and inundate said lands to the rear thereof and divert the water from the channel of the river. Such breach or crevasse in said levee would have entailed damage thereunto and to the adjacent landowners and impaired the efficacy of said levee system as projected, constructed, and maintained by the officers of said Mississippi River Commission in accordance with the plans heretofore stated.

"In addition to the danger which threatened the levee, said current impinging upon the banks of the stream, and the neck of land adjoining Point Chicot to the main land, cutting into it, threatened to and would have, if permitted to continue, cut through said neck of land, thus straightening the channel and making Point Chicot plantation an island.

"VI.

"In order to prevent the threatened danger, both to the levees and to the integrity of the connecting neck of land, the officers and agents of the United States Government, acting under authority of the acts of Congress, and the Mississippi River Commission, constructed what is known as the Leland Dike, running diagonally and at an angle from the main line of levee on the Arkansas side, across and on said land, to a point 662 feet beyond where the line of said Point Chicot plantation begins, their object being to divert the current of the stream during high waters, from impinging upon said levee, and by throwing it northeastward by said dike, to prevent the destruction of the levee, and the cutting across the neck aforesaid.

"Said dike first went over, into, and upon the land of claimants aforesaid a distance of 662 feet, but the

end of said dike being exposed to the waters of the Mississippi River, and to the powerful current as above mentioned, the said officers and agents of the United States Government deemed it necessary to extend the same a distance of some 2,700 feet farther into and upon the land of claimants, and did so extend the same in the year 1907, without any condemnation of said land, and with no remuneration therefor being made to claimants, said officers and agents using a large part of the soil of claimants' plantation for the construction of said extension.

"Before the joining of the levee lines by the United States in accordance with Eads' plan (thus making the same continuous) there were occasional overflows of the Chicot plantation, but they have been made deeper and more forceful by the adoption of said system. However, *these overflows before the erection of said dike did not materially damage the same and said lands remained still valuable for agricultural purposes.* Since the erection of said extension of said dike and by reason thereof the high-water current of said river has been deflected over and across a large part of said Chicot plantation, but flows in the same direction as did a portion of the high waters of the river before the erection of said dike, but with greater force and depth, the escape of a portion of the high waters over and across the neck of land connecting said Point Chicot plantation have been greatly increased and intensified, the result of which has been to wash and scour out its top soil and to deposit upon a large part thereof great burdens of sand and gravel, and 3,696 acres of said lands have thereby been rendered totally unfit for cultivation or any other profitable use by the owners thereof. This result has been caused partly by the joining of said levee systems and the erection of said dike, *but directly and proximately by the erection of said dike.*

"X.

"The 3,696 acres of land hereinbefore mentioned at the time of the erection of Leland Dike was of the value of $83,920. 31.4 acres of the same is actually and wholly occupied by the United States by the

construction of the dike before mentioned, and the balance of said 3,696 acres to wit, 3,664.6, has been destroyed and rendered totally unfit for cultivation or any other profitable use by the owners thereof, as found in Finding VI.

"XI.

"The court finds as an ultimate fact, in so far as it is a question of fact, that the said 3,696 acres of land was somewhat impaired in value by the construction of said levee system, but that its use was totally destroyed by the erection of said Leland Dike and was thereby taken, its value at the time of such destruction and taking being $83,920." (Italics ours.)

It will be seen that the act forming the basis of claimants' issue was solely that of the officials of the Government; that the lands are actually destroyed as agricultural lands, and that the construction of the said dike by an individual or private corporation would have been a trespass and its maintenance a continuous trespass; that the lands upon which the dike is constructed, the dirt of which it is constructed, and the lands destroyed were a part of the same plantation owned in fee by claimants, and theretofore in a state of cultivation. They regret the unavoidable necessity for frequent restatement and reiteration of the salient facts in the course of their brief, but have found it impossible to escape it in the discussion of the authorities.

ARGUMENT.

Claimants submit that the principles of law governing this case are very clear and well defined; that they have been enunciated by this court and other courts on numerous occasions in well-considered cases. The principal difficulty confronting courts in deciding questions of liability for such injury or destruction of lands as may constitute a taking and create the implied contract for compensation therefor is in determining whether or not the facts of each particular case bring it within the well-established principles. Claimants submit that there can be no doubt in the case at bar that the facts constitute indubitably a taking of their land within the meaning of the cases which will be hereinafter cited. They rely upon the following propositions of law:

(*a*) The occupation and use of that part of their plantation, consisting of the 31.4 acres, constituting the site of the Leland Dike, without condemnation thereof or compensation therefor by the agents and officers of the Government, engaged in carrying out plans for the improvement of navigation or the preservation of the levee system, constitute a physical invasion of claimants' lands and ouster of them from its possession, which in an individual would be a trespass, and which being done by the said officers and agents of the Government constitutes a taking of said lands, for which compensation should be made. This proposition is undisputed by appellant.

(*b*) The superimposition of sand and gravel on the 3,664.6 acres of the adjacent lands of the claimants, constituting a part of the same tract as the dike site, as an immediate result of the construction of the dike, so as to destroy their value and prevent their use by the owners, is also a physical invasion and ouster, and such destruction has constituted a taking and created a right for compensation therefor.

(*c*) Such destruction of said lands as an immediate result of the taking for the dike site and the effect and use of said dike as intended and foreseen constitutes a taking and creates a liability.

(*d*) The value of said lands is to be fixed as of the time of the taking.

In support of the preceding positions, claimants first cite the decisions of other courts, concluding with those of the Supreme Court of the United States. Most of these cases, they submit, are not so strong as the case at bar, those of Pumpelly and Lynah resembling it strongly.

The case of *King vs. U. S.*, 59 Fed., 9, is not nearly so strong a case as the Archer case, yet the court held there for the plaintiff, although the works themselves were not located upon the lands of the plaintiff, because the water of the Savannah River was forced over his plantation, by being backed thereon by said works. The court held in part:

> "This gradual result was begun to be felt when the cross-tide dam was finished, and was experienced in 1885, 1886 and 1887, and gradually grew worse, and has existed continuously to the present time. The plantation was finally abandoned from these causes in 1888.
>
> "Beyond the backing up of the water on and in the plantation by reason of the obstructions, and this invasion of these lands by this superadded water around and in the plantation as above described, rendered necessary by the execution of the Government plans as set forth above, the United States Government has not and does not use these lands for any purpose, nor is it in possession of them or any part of them. * * *
>
> "The Government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in the Savannah River has been raised at plaintiff's land, has been backed upon it so that the drainage has been destroyed, the water kept on the land, and forced up into it, making it finally

wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided. Pumpelly *vs.* Green Bay Co., 13 Wall., 181."

In *Williams vs. U. S.*, 104 Fed., 50, there was no use and occupancy of the land of the plaintiff by the works constructed by the Government, but merely a flooding of the land, as a result of such works. The court, however, held that the backing of the waters directly over the land and rendering it valueless constituted a taking thereof. We quote from the opinion:

"The facts found show that by reason of the obstructions so placed in the Savannah River and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation and forced on the land; the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and, in addition thereto, holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same; by all of which the plantation has been rendered absolutely valueless. All of which is the result of the Government improvements and works, and without which its purposes could not be carried out and effected. This is a taking within the meaning of the fifth amendment.

"The plantation of the plaintiffs being actually invaded by the superinduced addition of the water directly caused by the Government dams, obstructions, and works backing up the water of the river, and raising the water level at and upon and in the rice plantation, and holding back and retaining upon the same the freshets, and making the same absolutely unfit for cultivation of rice or any other known article, and plaintiffs having been compelled thereby to abandon their plantation, and being practically ousted of possession, and this being a permanent and continued

condition, and the plantation being thereby rendered irreclaimable and become of no value, renders the action of the Government a taking of land for public purposes, within the meaning of the fifth amendment to the Constitution, for which compensation is due the plaintiffs."

As to what constitutes a taking, in M. & C. Railway Co. *vs.* B., S. & T. Railway Co., 18 L. R. A., 166, the court said:

"On the question as to what constitutes 'a taking of property' within the meaning of the constitutional provisions as to compensation, modern decisions, strongly tend to the doctrine, that the destruction of property rights is the taking of property, although there be no dispossession."

In Merriam *vs.* U. S., 29 Ct. of Cls., 250, the court said:

"Where the United States occupy land by the overflow water, as in this case (backing up water by raising a dam) in a public improvement, without any claim of title or right to the same, it is in law to exercise the right of eminent domain, from which an implied contract arises to pay the reasonable value of the land."

In Fawcett *vs.* U. S., 25 Ct. of Cls., 188, the court held:

"If private property is taken for public use, the Government clearly recognizing at the time of taking that it is a taking of the property of the citizen, and no claim of ownership or title is made to the property by the Government, it might be held that the mere appropriation by the Government without the knowledge or consent of the owner would create an implied obligation to pay, on which in a judicial proceeding the United States might be held liable; in other words, when the Government, in the exercise of the right of eminent domain, appropriates, or uses private property, there is an implied agreement to pay it on which a suit can be maintained, unless the cause is barred by the statute of limitations."

In Morris *vs.* U. S., 30 Ct. of Cls., 324, the court held in part:

> "Where the Government takes and permanently appropriates land without asserting title to it, an implied contract arises of which this court has jurisdiction.
>
> "Where a break in a dam necessitates a levee, and that the taking of the land of complainant, there is a cause of action."

Going even further than any of the above are the following expressions, quoted herein because of their peculiar applicability to this case, wherein the dike was constructed for the purpose of saving the levee which was protecting the hinterland:

> "Where property is taken or destroyed to prevent further or greater injury to the public, the party is entitled to compensation. Grant *vs.* U. S., 1 Ct. Cl., 41."
>
> "A public emergency justifies the forcible taking of private property. Mills *vs.* U. S., 19 Ct. Cl., 79."

Taking up for final consideration the decisions of this court, which most clearly enunciate and establish the principles upon which claimants rely for relief, we wish to submit the following authorities in support of the propositions of law hereinbefore stated:

U. S. *vs.* Great Falls Mfg. Co., 112 U. S., 645:

> "The making of the improvements necessarily involved the taking of the property, and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way payment of compensation required by the Constitution (upon which question we express no opinion), there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand

just compensation. Kohl *vs.* U. S., 91 U. S., 374 (XXIII, 452). In that view, we are of the opinion that the United States having, by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government as well as with common justice, the claimant's cause of action is one that arises out of an implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims, of actions founded upon any contract, express or implied, with the Government of the United States. * * *

"In the present case there was, it is true, no statutory proceedings for the condemnation of the claimant's property rights. Such proceedings, as has been stated, were instituted by the United States in one of the courts of Maryland in which the property rights of the claimant were expressly recognized. But they were abandoned. One reason, perhaps, for such abandonment was, that in the judgment of the officers of the United States, a fair assessment of damages could not be had in the mode prescribed by the Maryland statute. Be this as it may, it is clear from the record, that the Government did not assert title in itself to this property, at the time it was taken."

In U. S. *vs.* Lynah, 188 U. S., 445, the court held in part:

"The case, therefore, amounts to this: The plaintiffs alleged that they were the owners of certain real estate bordering on the Savannah River; that the Government in the exercise of its powers of eminent domain and regulation of commerce, through officers and agents duly empowered thereto by acts of Congress, placed dams, training walls, and other obstructions in the river in such manner as to hinder its natural flow, and to raise its waters so as to overflow the land of plaintiffs, and overflow it to such an ex-

tent as to cause a total destruction of its value. The Government, not denying the ownership of plaintiffs, admitted that the work which was done by its officers and agents was done by authority of Congress, but denied that those works had produced the alleged injury and destruction. We are of the opinion that under these pleadings and the issues raised thereby the circuit court had jurisdiction to inquire whether the acts done by the officers of the United States under the direction of Congress had resulted in such an overflow and injury of the plaintiff's land as to render it absolutely valueless, and if thereby the property was in contemplation of law, taken and appropriated by the Government, to render judgment against it for the value of the property so taken and appropriated.

"Was there such a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate the title. There was no adjudication that fee had passed from the land owner to the Government, and if either of these be an essential element in the taking of lands, within the scope of the fifth amendment, there was no taking. Some question is made as to the meaning of the findings. It appears from the fifth finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the Government works was to take away the possibility of drainage. But findings IX and X show that, both by seepage and percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about 18 inches; that it is impossible to remove this overflow water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly

destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the Government has undertaken. Does this amount to a taking? The case of Pumpelly *vs.* Green Bay & M. Canal Co., 13 Wall., 166; 20 L. Ed., 557, answers this question in the affirmative. And on the argument it was conceded by learned counsel for the Government (and properly conceded in view of the findings) that so far as respects the mere matter of overflow and injury there was no substantial distinction between the cases. In that case the Green Bay Company, as authorized by statut , constructed a dam across Fox River, by means of which the lands of Pumpelly were overflowed and rendered practically useless to him. There as here no proceedings had been formally taken to condemn the land. Referring to this it was said (p. 177, L. Ed., p. 560):

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision and that such damage is a consequential result of such use of a navigable stream as the Government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security against the Government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of the word it is not *taken* for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of a citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of public good, which had no warrant in the laws and practices of our ancestors * * *.

"It is clear from these authorities that where the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the fifth amendment. While the Government does not proceed directly to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to the riparian proprietor—pass to the Government, and it becomes henceforth the owner."

From Pumpelly *vs.* Green Bay & Mississippi Canal Co., 80 U. S., 166, we quote in addition to those quotations of the court in the Lynah case first cited:

"We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked, that for a consequential injury to property of the individual arising from the prosecution of improvements of roads, streets, rivers and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and in some cases, beyond it, and it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material or by having any artificial structure placed upon it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of

> the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

As to the question of payment for the 3,664.6 of the tract we cite Sharp *vs.* U. S., 191 U. S., 351, and quote as follows:

> "If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings."

We also cite U. S. *vs.* Grizzard, 219 U. S., 180, in which the court held in part:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted." * * *
>
> "The constitutional limitation upon the power of eminent domain possessed by the United States is that 'private property shall not be taken for public use without just compensation.' The 'just compensation' thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel or single tract of land, shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder the owner is not justly compensated by paying only for that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account both benefits, which accrue and the depreciation which results to the re-

mainder in its use and value. Thus in Bauman *vs.* Ross, 167 U. S., 548, 574; 42 L. Ed., 270, 283; 17 Sup. Ct. Rep., 966 and 976, it is said:

" 'Consequently, when only part of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.' "

Claimants also cite without quotation Welch *vs.* U. S., 217 U. S., 33, and Manigault *vs.* Springs, 199 U. S., 473, in which latter case the court, after reviewing various authorities on the subject of the distinction between a taking and a consequential injury, declared the rule to be that there is a taking demanding compensation where there is a practical destruction or material impairment of the value of plaintiff's lands.

REPLY TO ARGUMENT OF APPELLANT'S BRIEF.

Claimants submit that if the Government is liable for the value of the lands actually occupied by Leland Dike, which is admitted, then it is equally liable for the lands lying adjacent thereto, forming part of the same tract, belonging to claimants and destroyed as a result of the construction of the Leland Dike. Whether this is a remote or direct result and injury to claimants is the sole question raised by the Government for decision by this court. The governing rules of law are clear; the only question is as to the legal significance of the facts.

I.

Consideration of Cases Cited by Appellant as Controlling.

Counsel for the Government rely upon the Jackson, Hughes and Bedford cases. In the outset of their reply claimants would direct the attention of the court to the four diagrams submitted herewith, illustrating each of these three cases and the instant case, in support of their position that no one of the three cases mentioned is in point by reason of essential differences in fact. These diagrams we do not claim to be mathematically or geographically accurate, but merely illustrative.

The *Jackson case*, 230 U. S., 1, virtually asks relief because the Government had failed to construct a levee protecting the lands of claimants which lay between the hills and the bank of the Mississippi River. This stretch had not been leveed because the extent and value of the lands between the bank of the river and the hills, which form a natural levee, did not justify the expense. The result was that these lands, being unprotected, were flooded. There was no permanent flooding or direct invasion of their lands by the Government, nor taking possession thereof, nor construction of works thereon. The damage to them was a remote and consequential one, merely incidental to the general power of the United States to construct works beneficial to navigation. Claimants submit that there is not the slightest similarity between the Jackson and Archer cases. Claimants, in the case at bar, do not ask for any compensation as a result of the construction of the general levee system, their lands not having been materially injured thereby, but only for the destruction immediately caused by Leland Dike, built upon their lands without condemnation thereof. They do not complain that the dike was not constructed in front of their plantation, nor ask the Government to levee their plantation, but complain because the

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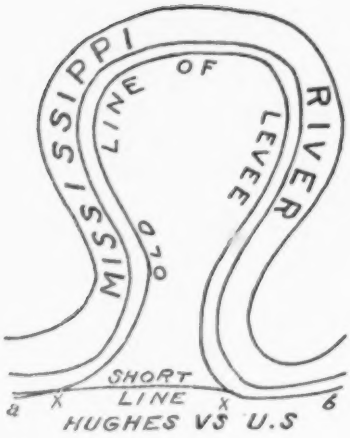
RIVER
LINE OF HILLS
JACKSON VS U.S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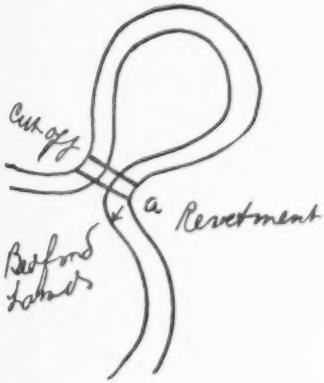
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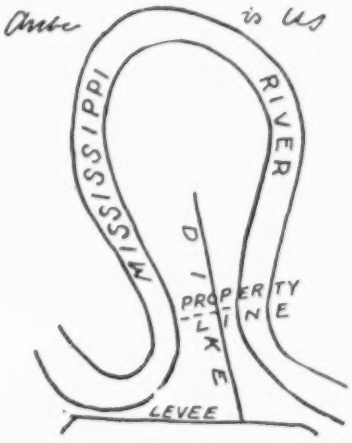
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Government built the dike upon their plantation and caused its ruin.

In the *Hughes case*, 230 U. S., 24, there had been a line of levee running around Huntington Point, a point in the river in general shape very similar to Point Chicot and hundreds of other points on the Mississippi River, which long line the local authorities, for economic reasons, abandoned, constructing a short line just beyond the land side of the neck of the point, which short line connects the near approaches of the main levee A-B at the points *x* and *y* as shown by the diagram. They thereafter abandoned the whole line of the longer levee around the point, and, the flood-waters of the Mississippi River yearly becoming higher, they finally went over this whole line of the outside abandoned levee and flooded the Huntington Point lands, rendering them absolutely worthless. Here, again, the facts are totally different from the Archer case, the claims virtually being that their lands were not protected by the levee. There was no invasion of their lands, no works erected thereon, no ouster of possession; they were simply left alone, which the Archers most emphatically were not.

In the *Bedford case*, 192 U. S., 217, a revetment was built several miles above the Bedford lands with the purpose and effect of preventing any further erosion of the bank of the river at that point from the cut off of 1876, and of preserving the *status quo*. There was no deflecting of waters upon the Bedfords, but merely a holding of the current as it was; there was no direct invasion of the Bedford lands; he was not ousted from his possession; there was no construction of works upon his land, the result being that he had no legal ground of complaint. In the Archer case the facts are directly the opposite. There is a physical invasion, a direct ouster, the construction of works upon their lands and the deflection upon their immediately adjoining lands of the high-water currents, which theretofore had flowed across the narrow neck between them and the mainland, causing them no damage.

Claimants do not now nor did they in their original petition take the position of the Bedfords, that their lands should be preserved at the cost of others. They did not ask that the high-water current be permitted to wash away the Arkansas Levee and inflict great damage upon other lands; nor do they complain merely because the construction of the dike upon their plantation obviated that disaster, but they do claim that the destruction of their lands thus sacrificed should be paid for, and submit that under the rules of this court and the facts of this case they are legally entitled to such compensation.

That the Government has the right to construct levees and such works as this dike, which was not strictly a levee, but an earthwork to protect a levee by preventing the erosion thereof, is undisputed and indisputable, but claimants deny that its construction in the instant case without condemnation of the lands occupied was lawful or just within the meaning of *Greenleaf-Johnson Lumber Co. vs. Garrison*, 237 U. S., 251. Claimants admit the perfect right of the Government to construct any works deemed by it necessary for the improvement of navigation, but submit that there are legal methods of procedure for the acquisition of lands therefor in the first place, and that the Government as an inescapable concomitant of its right owes a corresponding duty to compensate for such injuries as are immediate, and not remote, resulting therefrom. "It is excellent to have a giant's strength, but it is tyrannous to use it like a giant."

Claimants recognize and admit the liabilities as well as the rights and benefits incident to riparian ownership, but submit that the injury here complained of was not remote but immediate, not a necessary incident of riparian ownership, but an uncompensated taking of their lands by the sovereign.

II.

Occupancy of Part of an Owner's Single Tract of Land Creating a Liability for a Damage to the Remainder.

Claimants rely upon and have hitherto quoted the rule quoted by appellant and stated in *U. S. vs. Grizzard*, 219 U. S., 180, which is as follows:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted."

Nothing could exceed the clarity of this statement by Justice Lurton, upon which claimants might safely rest their case. We quote further from the opinion:

> "The constitutional limitation upon the power of eminent domain possessed by the United States is that 'private property shall not be taken for public use without just compensation.' The 'just compensation' thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by the payment for only that actually appropriated and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account both the benefits which accrue and the depreciation which results to the re-

mainder in its use and value. Thus in Bauman *vs.* Ross, 167 U. S., 548, 574; 42 L. Ed., 270, 283; 17 Sup. Ct. Rep., 966, 976, it is said:

> " 'Consequently, when part only of a parcel of land is taken for a highway the value of that part is not the sole measure of compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When such part not taken is left in such shape or condition as to be in itself of less value than before the owner is entitled to additional damages on that account.' "

Claimants therefore submit that the rule in the Grizzard case is exactly applicable. The direct and immediate result of the construction of the dike built upon claimants' lands, which had been appropriated without condemnation or payment, was to ruin nearly four thousand acres of the adjacent remainder of the tract. The very purpose of the construction of the dike was to deflect the flood waters of the Mississippi River upon these lands. It cannot be even said that it was done in ignorance of the result, because the first invasion extended 662 feet within the property line of claimants, and was thereafter extended 2,700 farther, in order to still farther deflect the said waters, which the first dike had not sufficiently deflected, the extension also being without condemnation or compensation.

The case of *Sharp vs. U. S.*, 191 U. S., 341, cited by appellant, is in line with the rule above quoted, especially when it is borne in mind that all of the land in the case at bar forms one continuous tract.

> "If the remaining land had been part of the same tract which the Government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the Government, would be a proper subject of award in these condemnation proceedings."

The case of *Railroad Co. vs. Hopkins*, 90 Ill., 316, follows the rule above quoted, and more closely resembles the Archer

case, in that the railroad company, which had there occupied the right of way without condemnation, was held to be a continuous trespasser, and the owner entitled to payment for the land taken as well as compensation for any injury.

The same rule is followed in *Railway Co. vs. Hunt*, 51 Ark., 330; *Railway Co. vs. Allen*, 41 Ark., 431; *Railroad Co. vs. Roskemmer*, 264 Ill., 103; *Fort Smith, etc., Co. vs. Schulte*, 109 Ark., 575—all cited by counsel for appellant.

In *Peabody vs. United States*, 231 U. S., 530, the damage alleged was purely anticipatory and apprehensive; the injury was not accomplished, but was an airy figment of the imagination, there having been no actual physical encroachment by the Government, and no ouster. In the case at bar there is no anticipated injury complained of. The deposit of sand and gravel upon thousands of acres of land is a condition and not a theory. It has resulted in more than inconvenience to the owners, by rendering their lands absolutely unfit for cultivation or any other purpose.

Claimants submit that the case of *U. S. vs. Chandler-Dunbar Co.*, 229 U. S., 53, cited by counsel for appellant on pages 12 and 17 of his brief, is not in point as to the right to compensation, for the reason that in that case the claimants asked for compensation for the deprivation of the flow of waters, the court holding that there was no right of private property therein, for deprivation of which right compensation might be claimed, which certainly could not be said of lands held in fee simple by the Archers, and directly, not incidentally, destroyed.

The rule laid down in that case is that the lands to be paid for should be valued as of the time of the taking: the rule stated in *Railroad Co. vs. Hopkins*, 90 Ill., 316, and followed in the Archer case, the court below having fixed the value of the lands at the time of the destruction at $54,920.

Turning to the case of *Board of Levee Commissioners vs. Harkle-roads*, 62 Miss., 807, we find that the court held there, as this court did in the Hughes case, and as did the court in McCoy *vs.* Bd. of Directors, etc., 95 Ark., 345, that there

could be no recovery for lands left unprotected by the levee, which position, while correct, is not in point. In this case, however, the court applied the rule as to the right of the owner to have compensation for the fair market value of the land actually taken and for depreciation and damage to the remainder of the lands, with certain limitations, as quoted on page 13 of appellant's brief. The court, however, in that part of the opinion indicated in appellant's brief by asterisks, stated that the owner was entitled to recover the value of the lands overflowed by a lake dammed up by the levee, if the extent of the overflow is certain and ascertained, the overflow being a direct result of the levee, as here the sand and gravel deposit is a direct result of the dike. This is on the same theory of the right to recover for immediate injury to a part of a tract caused by the taking of another part.

In *Richardon vs. Levee Commissioners*, 68 Miss., 539, the court stated, in addition to the quotation cited on page 14 of appellant's brief, that the owner is entitled to all other damages to his adjacent lands which are not remote and which arise directly from the taking of a part of his land for levee purposes.

It may incidentally be stated that while these State cases are generally governed by local statutes, the general rules of law governing all these cases are very clear and firmly established. There can be no recovery for a failure to protect lands outside the levee, but that is not the base of the Archer claim. The owner is, however, entitled to recover not only the value of the land actually taken, but the damage to his adjacent lands forming part of the same tract, which is the Archer's position, their lands having been destroyed by a sovereign, whose destruction is interpreted to be a taking under an implied promise to pay.

In *Highbridge Lumber Co. vs. U. S.*, 69 Fed., 320, Judge Lurton, with his accustomed clarity, stated the governing legal principles, which were afterwards again stated by him in the Grizzard case. As the injury in the case at bar is not anticipated, but is one which has actually occurred, claimants

submit that their injuries are not consequential, but direct, and thus parts of the decision are not applicable to their case. We quote, however, from the opinion the following paragraphs, which were omitted from appellant's brief, believing them to support the position of claimants in this cause. In the case before Judge Lurton there had been a condemnation proceeding, not a taking without legal procedure or compensation, which circumstances, we submit, make the Archer case a much stronger case than the one decided by him.

> "In this case there had been no present appropriation or physical invasion of any part of the remainder of lands of plaintiff in error. There may never be such a permanent flooding as, under the Pumpelly case, will amount to a 'taking.' If, as apprehended, the level of the river shall be raised, so as to flood the remaining lands of the plaintiff in error but not of such a permanent character as to amount to a permanent flooding and a practical ouster of the owner, under the general rule, the owner, as a riparian proprietor affected by extraordinary or temporary flooding, will have sustained only such consequential damages as any and all other riparian proprietors will sustain as a consequence of the improvement of the river in the public interest. On the other hand, if the construction of the dam shall result in such permanent flooding as to amount to a 'taking,' the right of action for the value of the land then taken will for the first time arise, and could not be regarded as barred by the present proceeding.
>
> "Second. To now seek compensation for the remainder of the land on the theory that the dam will be so constructed and maintained as to permanently flood the remainder, and amount to a 'taking' of such land, is premature. The remainder has not yet been 'taken,' and until it has been appropriated in fact, by the permanent flooding, no right to be compensated will accrue."

It will be observed that he held in that case that a permanent flooding would be a taking, entitling the owner to compensation, as it would be a physical invasion and ouster.

Assuming that in the case at bar there had been no taking without condemnation or compensation, and that the public improvement was made without negligence, it seems superfluous to state that a permanent superimposition of sand and gravel could not be considered otherwise than as being as definite an appropriation as a permanent flooding by water would be.

Conclusion.

From the findings of the Court of Claims that the Leland Dike was built upon the lands of claimants, without any condemnation thereof or remuneration therefor, and as an immediate result, the said lands have been covered with a superimposed burden of sand and gravel, rendering 3,696 acres of them totally unfit for any profitable use, and that said lands were valuable for agricultural purposes prior to the erection of said dike and before their destruction as the result of the building of said dike, and from the further findings of fact that the said lands were valuable for agricultural purposes after the completion of the levee system, as well as the fact that these claimants have nowhere alleged or claimed that their injuries were a result of the completion of the levee system, but only the result of building the Leland Dike upon their land, and from the authorities hereinabove quoted, claimants submit that their case is squarely within the principles of law frequently enunciated by this court as to what constitutes a taking. It will be observed that the building of this dike was the act of the Government alone; that the works were constructed upon the lands of claimants and not at a distance from them, and that the total of 3,696 acres is made up of 31.4 acres, of which the Government took possession by entering upon and taking the same without any legal proceedings whatever, and of 3,664.6 acres immediately adjacent thereto and forming a part of the same tract upon which the deflected high-water currents of the

Mississippi River were thrown by said dike, and which were covered by sand and gravel as a result.

The taking of this property is, we submit, clearly and indubitably a taking, and not a damage. It is not a case in which the injury inflicted could be obviated by any act of the claimants. The removal of the sands and gravel superimposed upon the said land is out of the question and impossible. The land is simply ruined for all agricultural purposes; transformed into a waste.

Neither is this a case in which the injury is remote or consequential. There is here no case of preserving the *status quo*, as in the case of Bedford, nor of a remotely consequential effect, as in the Jackson and Hughes cases. Here there was a direct invasion of the land of claimants and an actual encroachment upon it and ouster of them from it; first by the construction of the dike, which went in and upon their lands for the distance of nearly 3,400 feet. The dike is of such size as to occupy over 31 acres. This hill of earth placed upon land to which the Government claimed no title and of which there had been no condemnation constituted what, if done by an individual, would be a trespass; but when done by the Government is construed as a taking. The floods of the Mississippi River, striking this artificial hill with tremendous force, and diverted by it from the course they were pursuing, and by these means turned on the cultivated land, which, before that time, in any overflow had only received the slack waters, which enriched the lands by their deposit of silt, covered the land with heavy burdens of sand and gravel. If this be not a direct and immediate result and does not constitute a taking, the claimants' plight is indeed a remarkable one. With their property destroyed by the direct act of the Government, it can surely not be urged that they are not entitled to compensation, and that this is merely a case of remote damage and not a taking.

The attention of the court is especially directed to the map between pages 22 and 23 of the record, showing the *locus in quo* and the diagrams on page 19 of this brief.

Claimants submit that there is absolutely no similiarity between this case and the Bedford, Hughes, and Jackson cases; that the base of the claim in this case is entirely different, and the facts entirely distinct and dissimilar. It is therefore respectfully submitted that the judgment of the court below should be affirmed.

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Attorney for Appellees.